No. 98-7540-CSY Title: Scott Leslie Carmell, Petitioner
v.
Texas

Docketed:
January 7, 1999 Court: Court of Appeals of Texas,
Second District

Entry	Date	Proceedings and Orders
	Dec 14 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 26, 1999)
	Feb 18 1999	DISTRIBUTED. March 5, 1999
	Feb 24 1999	Response requested.
	Mar 8 1999	Order extending time to file response to petition until April 26, 1999.
	Apr 23 1999	Brief of respondent Texas in opposition filed.
	May 5 1999	REDISTRIBUTED. May 20, 1999
	May 20 1999	Reply brief of petitioner Scott Leslie Carmell filed.
	May 24 1999	REDISTRIBUTED. May 27, 1999
	Jun 1 1999	REDISTRIBUTED. June 3, 1999
	Jun 7 1999	REDISTRIBUTED. June 10, 1999
	Jun 14 1999	Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT November 30, 1999. **********
	Jun 29 1999	Motion of petitioner for appointment of counsel filed.
	Jul 21 1999	Motion for appointment of counsel GRANTED and it is ordered that Richard D. Bernstein, Esquire, of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.
	Jul 21 1999	Petitioner's brief on the merits and the joint appendix are due on or before September 7, 1999.
	Aug 17 1999	Order extending time to file the Joint Appendix to and including September 17, 1999.
	Aug 18 1999	Order extending time to file brief of petitioner on the merits until September 17, 1999.
	Sep 16 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Sep 17 1999	Brief of petitioner Scott Leslie Carmell filed.
	Sep 17 1999	Joint appendix filed.
	Sep 17 1999	LODGING consisting of 20 copies of the House Research Organization report of March 15, 1993, submitted by counsel for the petitioner.
	Oct 6 1999	CIRCULATED.
	Oct 7 1999	Record filed.
	Oct 20 1999	Brief of respondent Texas filed.
	Oct 20 1999	Brief amici curiae of Kansas, et al. filed.
	Oct 20 1999	Brief amicus curiae of United States filed.
	Oct 22 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Nov 15 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

No. 98-7540-CSY

Entry	Date	Proceedings and Orders
	Nov 15 1999	Reply brief of petitioner Scott Carmell filed.
	Nov 15 1999	LODGING consisting of twenty bound copies of lower court material submitted by counsel for the petitioner.
	Nov 29 1999	LODGING consisting of twenty copies of relevant pages of "Proceedings Against Sir John Fenwick",(1702) submitted by counsel for the petitioner and distributed.
	Nov 30 1999	ARGUED.

(2)

No. 98-7540

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SCOTT L. CARMELL — PETITIONER

(Your Name)

VS.

THE STATE OF TEXAS — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[✓] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Trial court and the Second Court of Appeals at Fort Worth, Texas

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Scott L. Carmell

(Signature)

35 pp

98-7540

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Scott Leslie Carmell, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. March 1995; Approx. $500.00/ mthly.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No ✓

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No ✓

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: Dec. 1 —, 1998.

Scott L. Carmell
(Signature)

No. 98-7540

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SCOTT L. CARMELL — PETITIONER
(Your Name)

VS.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SECOND COURT OF APPELS AT FORT WORTH, TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Scott Leslie Carmell #777548
(Your Name)

2101 FM 369 North
(Address)

Iowa Park, Texas 76367-6568
(City, State, Zip Code)

(Phone Number)

98-7540
Carmell
v.
Texas

QUESTION(S) PRESENTED

(1)

Whether the Texas Court of Appeals erred in concluding that application of the 1993 version of Texas's article 38.07, Code of Criminal Procedure, was not ex post facto when: (i) the offense occurred in 1992, a full year before adoption of the new rule of law; (ii) there was no outcry for approximately three years, and the law in effect at the time required outcry within 6 months; and, (iii) the petitioner would have otherwise been entitled to an acquittal, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

(2)

Whether the Texas Court of Appeals erred in concluding that evidentiary criminal rule 608(b) was properly dispositive of the prosecutor's intentionally withholding evidence that was favorable to the accused, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

(3)

Whether the Texas Court of Appeals erred in concluding that testimony of "genital area" and "pubic hair" were constitutionally sufficient to support the conviction when the terms are not interchangeable, when they do not mean the same thing, and when they do not include the female sexual organ as defined by statute, in violation of the Fifth and Fourteenth Amendments to the United States Constitutions.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (Contd)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[✓] reported at 963 SW2d 833; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the criminal appeals court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[✓] For cases from state courts:

The date on which the highest state court decided my case was February 12, 1998. A copy of that decision appears at Appendix A.

[✓] A timely petition for rehearing was thereafter denied on the following date: March 26, 1998, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

[✓] A petition for discretionary review was thereafter denied on the following date: September 16, 1998. A copy of that decision appears at Appendix C.

STATEMENT OF THE CASE

On January 10, 1997, the Petitioner was convicted by jury in Denton County, Texas for sexual assault and indecency with a child, to-wit, his 15 year old step-daughter who testified they were "married." In a published opinion, the conviction was affirmed by the Second Court of Appeals at Fort Worth, Texas on February 12, 1998. See Appendix - A. Motion For Rehearing was denied without written order on March 26, 1998, Appendix - B, and the Petitioner's pro se Petition For Discretionary Review was denied without written order by State's highest criminal appeals court on September 16, 1998. Appendix - C.

The Texas court of appeals decision in this case is in conflict with other state and federal appeal court's opinions regarding whether article 38.07, Texas Code of Criminal Procedure is substantive. The new article, adopted in 1993 but applied to Petitioner for an offense that occurred in 1992, changed the amount of evidence necessary to obtain a conviction and eliminated a defense and possible acquittal that was otherwise available to the Petitioner. Its application here violated state and federal statutes and constitutional mandates against ex post facto laws. The court of appeals compounded that error by concluding that evidentiary rule 608(b) controlled the prosecutor's misconduct where he intentionally withheld favorable evidence from the accused that was beneficial to the defense and, finally, the court of appeal unfairly reduced the government's burden of proof by holding that the evidence was sufficient to sustain the conviction when the terms "genital area" and "pubic hair" have never previously been defined by statute or case law as being part of the female sexual organ.

REASONS FOR GRANTING THE PETITION

REASON FOR RELIEF NO. 1 - RESTATED

The Texas Court of Appeals erred in concluding that application of the 1993 version of Texas's article 38.07, Code of Criminal Procedure, was not ex post facto when: (i) the offense occurred in 1992, a full year before adoption of the new rule of law; (ii) there was no outcry for approximately three years, and the law in effect at the time required outcry within 6 months; and, (iii) the petitioner would have otherwise been entitled to an acquittal, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Arguments And Authorities

The Texas court of appeals decided an important questions of federal law that has not been but should be decided by this Court insofar as it has a far-reaching effect on many other people in the same or similar situation, whether in this state or not, and which is in conflict with other decisions of this Court and of the Texas courts. That is, the Texas court of appeals has misconstrued an issue of law to the petitioner's disadvantage, i.e., whether a state law passed in 1993 is an ex post facto application when applied to the instant case, which occurred prior to the passage of the 1993 version of article 38.07, Texas Code of Criminal Procedure.

In count seven of the indictment, the government charged the petitioner with sexual assault under Texas Penal Code Section 22.011. The government alleged the incident occurred when the complainant, the petitioner's disgruntled step-daughter, was 14 years old. (The complainant was born March 24, 1978 and the incident was alleged to have happened on June 1, 1992). Under Texas law, a conviction under Penal Code Section 22.011 is a second degree felony when the complainant is 14 years of age or older, and conviction under 22.021 is a first degree felony when

the complainant is thirteen or under. The Texas Code of Criminal Procedure, article 38.07, in effect at the time of the alleged offense, held that a conviction under either statute was not supportable on the uncorroborated testimony of a complainant unless that complainant informed a person other than the defendant of the alleged offense within six (6) months of the alleged offense. Here, the complainant's testimony was uncorroborated and the alleged 'outcry' did not come until some three (3) years later.

In May 1993, almost a year after the date of the alleged incident, Texas amended its statute to eliminate the 6-month outcry witness requirement for a 14 year old. The new amendment now extended the outcry to one full year, and then only if the alleged victim was eighteen years or older. Although the incident alleged against the petitioner was supposed to have occurred in June 1992, the prosecutor applied the law of 1993 to a case that was being tried before a jury in January 1997. Had the Texas court of appeals applied the law in effect at the time of the alleged incident, the petitioner would have been entitled to an acquittal because there was no outcry testimony within the 6 months as required by statute to support the uncorroborated testimony of the alleged complainant. Hence, when the government applied the 1993 law against the petitioner in 1997 for an incident that allegedly happened in 1992, the petitioner was deprived of a favorable defense at trial and on appeal - both of which would have resulted in an acquittal. Moreover, the application of the 1993 law unfairly reduced the government's

burden while simultaneously increasing the petitioner's burden. On intermediate appeal and during petition for discretionary review, the Texas courts did not address the issue that application of the new law deprived the petitioner of an affirmative defense and an acquittal. Instead, and without comment, the appeal court simply applied the 1993 amended version retroactively and against the Federal and State constitution's prohibitions against ex post facto laws, and then affirmed the conviction.

According to Texas's own case law, the purpose of the older 1983 version of article 38.07 was to require stricter proof of offenses allegedly committed against complainants age fourteen and over. See Scoggan v. State, 799 S.W.2d 679, 683 (Tex.Cr.App. 1990) (corroboration requirements not met so evidence insufficient). Other Texas courts have entered acquittals in similar situations. Please see and consider: Friedel v. State, 832 S.W.2d 420 (Tex.Ap.-Austin 1992); Jones v. State, 789 S.W.2d 330 (Tex.App.-Houston [14th Dist.] 1990); Hill v. State, 658 S.W.2d 705 (Tex.App.-Dallas 1983); Bowers v. State, 914 S.W.2d 213, 217 (Tex.App.-El Paso 1996).

In this case, the government's 1997 application of the 1993 law to a 1992 offense resulted in an unconstitutional ex post facto application for the reason that it changed the rules of evidence against the accused to require less proof to convict him and deprived him of an affirmative defense and, finally, it deprived him of an acquittal that he would have otherwise been entitled to had he been tried under the law in effect at the time

of the alleged offense. Please see and compare Lindsey v. State, 672 S.W.2d 892, 894 (Tex.App.-Dallas 1994) and Bowers v. State, 914 S.W.2d 213, 217 (Tex.App.-El Paso 1996) with this Court's decision in Collins v. Youngblood, 110 S.Ct. 2715 (1992), and Texas's reasoning and application of Youngblood in Ex Parte Hallmark, 883 S.W.2d 672 (Tex.Cr.App. 1992) and Grimes v. State, 807 S.W.2d 582 (Tex.Cr.App. 1991). Hence, certiorari should be granted because Texas's application of the 1993 law to the facts of this case violated the Supreme Court's prohibitions against ex post facto law under the Fifth and Fourteenth Amendments to the United States Constitution.

REASON FOR RELIEF NO. 2 - RESTATED

The Texas Court of Appeals erred in concluding that evidentiary criminal rule 608(b) was properly dispositive of the prosecutor's intentionally withholding evidence that was favorable to the accused, in violation of the Sixth and the Fourteenth Amendments to the United States Constitution.

Arguments And Authorities

The Texas court of appeals seriously misconstrued evidentiary rule 608(b) (the same as the federal evidentiary rule) insofar as the court declared that the prosecutor could use Rule 608 to intentionally withhold evidence from the accused by claiming that the evidence was inadmissible impeachment material, and without testing the government's claim or analyzing the truth of the evidence. Thus, the Texas courts have so far departed from the accepted course of proceedings as to call for this Court to exercise its supervisory powers to enforce and uphold the Constitution of the United States of America.

The petitioner has not enjoyed one fair proceeding in any state court below. His trial was saturated with incompetent, unreliable and prejudicial hearsay testimony, the appeal was half reasoned and applied archaic law while using modern vernacular and offering little more than lip service in an opinion directed as supporting a conviction rather than upholding constitutional principles.

Here, the Texas court of appeals was wrong to hold that testimony about the accused's wife having extra-marital sexual relations with another man and that she had his baby, would not be admissible as impeachment material. See Appendix-A, at page 10, citing Rule 608(b) and Ramos v. State of Texas, 819 S.W.2d 939 (Tex.App.-Corpus Christi 1991). Evidence of a witness's bias is admissible as impeachment material, especially evidence that a married woman has another man's baby at about the same time she and her daughter bring serious charges against her husband. Such evidence is admissible to show her character, her integrity, and her reliability for truthfulness. In the instant case, the evidence of the wife's extramarital affair before her separation from the husband she is testifying against would clearly expose her bias, and should have been admitted into evidence for the jury's informed deliberation.

Evidence of a witness' bias is critical to the fairness and proper functioning of the adversarial process. It is part of the truth seeking function of the trial, a very integral and real part of fairness that should not have been hidden in this case by the prosecutor. Juries cannot weigh evidence and testimony

without full knowledge of the witnesses' motivations. A witnesses' motive for testifying for the government should never be allowed hidden from the jury behind words like 'irrelevant' or 'immaterial.' Davis v. Alaska, 94 S.Ct. 1105 (1974), and Steve v. State of Texas, 614 S.W.2d 137 (Tex.Cr.App. 1981).

Great and fair latitude should be allowed the accused to show animosity, bias, or motive on part of an adverse witness. Juries have a right to fairly weighing the evidence, and part of that right includes weighing of the witnesses' credibility for truthfulness. In this case, no greater tool exists on today's modern legal market for the mother than use of the courts to secure what she wants. In one sweep she takes home, car, bank accounts, property and children, and rids herself of a husband she no longer wants while enjoying her affair and having another man's baby.

In Davis this Court wrote that "the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id., 94 S.Ct. at 1110, citing authorities. Although the Texas courts have applied Davis and reached the same conclusion, see Evans v. State of Texas, 519 S.W.2d 868 (Tex.Cr.App. 1975), that conclusion was not but should have been applied in this case.

It cannot be ignored or forgotten that the petitioner's wife gave birth to another man's baby at about the same time she was working with the government to imprison her husband. It also cannot be ignored, excused, or disregarded that the prosecutor purposely and intentionally lied to the defense when counsel

asked the prosecutor whether the baby in the courtroom belonged to the defendant's wife, and the prosecutor said that it did not. It is uncontroverted that the prosecutor lied to defense counsel. That, within itself, was a deliberate misconception and an abuse of the discovery process. It was clearly designed to deprive the accused of favorable testimony on cross, and impeachable testimony that would have damaged the State's case in the eyes of the jury which, of course, the prosecutor knew. For this reason, the Texas court of appeals erred in holding that evidentiary rule 508(b) controlled to exclude the evidence in that the evidence was admissible to show motive, bias and prejudice on the witness's part. Hence, the jury had a right to hear the evidence of who the child belonged to, and the petitioner had a right for his jury to hear the evidence insofar as it related to the credibility of the government's witness. Because the error contributed to the conviction, the verdict should be reversed and this matter remanded for further proceedings.

REASON FOR RELIEF NO. 3 - RESTATED

The Texas Court of Appeals erred in concluding that testimony of "genital area" and "pubic hair" were constitutionally sufficient to support the conviction when the terms are not interchangeable, when they do not mean the same thing, and when they do not include the female sexual organ as defined by statute, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The texas court of appeals has decided an important question of state and federal law not previously decided, and which could have a significant impact on similar type cases in all states, in declaring that pubic "hair" and genital "area" constitute part of the female sexual organ for purposes of sexual related offenses.

The question presented here is whether the Texas courts erred in equating a female's genital "area" or her pubic "hair" with her vulva, the vagina or vaginal canal, the uterus, mons pubis, or the labia. These terms are not synonymous and interchangeable as the government would like the public to believe. Common sense and even the slightest education says that the term genital "area" includes much more than just the labia minora or mons pubis. LIkewise, pubic "hair" in no way equates with the vaginal canal or the uterus. As a matter of logic and common sense, as well as logistics, genital "area" means the area around and including the genitals. This area, then, includes the female sexual organs and other parts of anatomy <u>not</u> identified with the female sexual organs. By analogy, if a person has been in the Washington area have they actually been to Washington, then? Or would being in Alexandria or Baltimore qualify as a substantive proof of being in Washington per se? However, being in Washington places one in the Washington area. But the Washington area does not necessarily place one in Washington. In this token, touching one in the genital "area" does not necessarily mean or include touching one on the vulva or vagina. And touching one's pubic hair does not equate with touching one's labia minora. Pubic hair does not necessarily include the female sexual organ for the reason that it is not unusual for pubic hair to extend from the navel to the thigh area. If the Texas court's logic were correct, which it is not, then it would be a sexual offense to touch one's navel or even their mid- to lower thigh area. Legislatures, however, chose to identify the female sexual

organ by statute. And that definition does not include pubic hair or genital area as being part of the female sexual organ--as the court appears to legislate from the bench. Hence, the term genital "area" indicates the area around the genitals while pubic "hair" extends far past the genitals, genital area, and the female sexual organ.

If the contact of which the witness complained was in the genital area but not on the genitals themselves, then no offense was committed under state or federal law. Because the question is not resolved by the evidence on record, a reasonable doubt exists as to the essential elements of the offense. The terms genital "area" and pubic "hair" simply are not interchangeable with each other or other parts of the female anatomy and are therefore not legally sufficient to sustain the conviction. They are too vague and too poorly defined to sustain a conviction in a case where the constitution requires proof beyond a reasonable doubt. Had the indictment alleged merely pubic "hair" or genital "area," it would have been subject to motion to quash for failure to follow the necessary statutory language, and for failure to put the accused on proper notice.

The constitution and the criminal statute require proof of contact with the female "sexual organ," and not "in the area of" the female sexual organ. Here, the Texas court of appeals held that the navel and the upper and lower thigh area are equivalent to or are parts of the female reproductive organs, resulting in unwarranted legislation from the bench and making it a criminal offense to touch one in the area of the thigh or navel, despite

any legislature ever doing so. At no time did the complainant testify that the petitioner ever touched her "vagina" or her "genitals." The complainant was very intelligent and well educated lady, studying to be a psycho therapist. Had she been a small child or uneducated, handicapped or unlearned, then a reasonable person could allow latitude for the expansion of a definition. But that is not the case here. Instead, the government sought to expand the statute to include definitions and areas of the anatomy which legislation carefully and purposely decided against.

In revieving the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution. Jackson v. Virgina, 99 S.Ct. 2781 (1979); Geesa v. State of Texas, 820 S.W.2d 154 (Tex.Cr.App. 1991). In Jackson, this Court held that the evidence was legally insufficient if no rational trier of fact could find proof of guilt on each essential element of the offense beyond reasonable doubt. Petitioner submits that he has raised more than enough doubt to undermine the reasonableness of the verdict. The government simply should not be allowed to expand the definition of a statute or an offense beyond what the legislature has chosen in order to sustain a conviction that at the least is insupportable and at the worst is obtained through linquistic gymnastics. Clearly, the government has failed to meet its burden of proof and the conviction must therefore be reversed.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the conviction should be reversed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Scott L. Carmell

Date: December 1, 1998

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-97-197-CR

Scott Leslie Carmell	§	From the 367th District Court
	§	of Denton County (F-96-1227-E)
vs.	§	February 12, 1998
	§	Per Curiam
The State of Texas	§	(p)

JUDGMENT

This Court has considered the record on appeal in this case and is of the opinion that there was no error in the judgments of the trial court.

It is the order of this Court that the judgments of the trial court are affirmed.

PETITIONER'S APPENDIX- A

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-97-197-CR

SCOTT LESLIE CARMELL — APPELLANT

VS.

THE STATE OF TEXAS — STATE

FROM THE 367TH DISTRICT COURT OF DENTON COUNTY

OPINION

I. Introduction

Appellant Scott Leslie Carmell was convicted of eight counts of indecency with a child, two counts of aggravated sexual assault, and five counts of sexual assault against his stepdaughter K.M. The jury assessed punishment at life on the aggravated sexual assault counts and 20 years on the remaining counts. In six points, appellant argues that (1) the trial court erred in denying his motion for new trial because the State did not disclose impeachment evidence and (2) the evidence was legally insufficient to support the aggravated sexual assault convictions, one of the indecency convictions, and one of the sexual assault convictions. Because we find that the impeachment evidence would not have been admissible and that the evidence was legally sufficient, we affirm the convictions.

II. Legal Sufficiency of the Evidence

In five points, appellant challenges the legal sufficiency of the evidence regarding four of the convictions.[1] We will try to limit the recitation of the facts to these four counts as much as possible due to the disturbing and graphic nature of this case.

A. Factual Background

Ron Borchert and Eleanor Alexander married in 1972. K.M. was born on March 24, 1978. Eleanor began to see appellant, a counselor specializing in counseling victims of incest, because she was an incest survivor. In early 1987, Eleanor divorced Ron and married appellant the next year.

By the time K.M. was twelve, appellant would give her a back rub every night after she said her prayers. Soon the back rubs changed, and appellant

---

[1]Although appellant challenges the denial of his motions for an instructed verdict, the points actually attack the legal sufficiency of the evidence. *See Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990), *cert. denied*, 499 U.S. 954 (1991).

would tell K.M. to take her shirt off and pull her shorts down a little. In the spring of 1991, appellant touched her "on the pubic hair" during one of the back rubs. Appellant then decided that he and K.M. needed to "date" and spend every Tuesday night together. This included sleeping in the same bed. Appellant claimed that this was part of the family's bonding process.

In the summer of 1991, appellant took his clothes off, got in a sleeping bag with K.M., and pulled her on top of him. He put his erect penis between her legs, and his penis touched her "genital area." Later that summer, appellant and K.M. were sleeping together nude when appellant pulled K.M. on top of him. He put his erect penis between her legs and pushed against her "pubic" or "genital" area. In June 1992, appellant took K.M. into his bedroom for a "nap." They undressed, and appellant pulled her on top of his erect penis, touching her "genital area."

These incidents and more finally led to appellant having sex with K.M. in September 1993. Two days later, appellant "married" K.M. in a mock ceremony and continued having sex with her until early 1995.[2] K.M. finally told her mother about the long-term abuse, and her mother took her to the police. At trial, Eleanor testified that once while she visited appellant in jail, he wrote

---

[2]Appellant was a devoted correspondent and would send letters and cards to K.M., signing them "Dad, friend, and partner for life." [IX RR 165]

"adultery with [K.M.]" on a piece of paper when she told him that he needed to confess if he was sorry for what he had done to K.M.

B. Standard of Review

In reviewing the legal sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the jury's verdict. *See Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 975 (1993). The critical inquiry is whether, after so viewing the evidence, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Emery v. State*, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1192 (1995). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979).

The legal sufficiency of the evidence is a question of law. The issue on appeal is not whether we as a court believe the State's evidence or believe that the defense's evidence outweighs the State's evidence. *See Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991); *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App.), *cert. denied*, 469 U.S. 892 (1984). The verdict

may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *See Matson*, 819 S.W.2d at 846.

C. June 1992 Sexual Assault

1. Timing of the outcry

In his sixth point, appellant argues that he should be acquitted of one of the sexual assault convictions because K.M. did not tell her mother about the abuse until "years after the offense" and there was nothing to corroborate K.M.'s version of events.

Appellant bases his argument on the version of article 38.07 that was in effect in June 1992, the date of the charged offense of sexual assault:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense. The court shall instruct the jury that the time which lapsed between the alleged offense and the time it was reported shall be considered by the jury only for the purpose of assessing the weight to be given to the testimony of the victim.[3]

---

[3]Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91 & Act of May 29, 1983, 68th Leg., R.S., ch. 977, § 7, 1983 Tex. Gen. Laws 5317, 5319.

This statute was amended in 1993 to provide that the outcry had to occur within one year after the offense only if the victim was 18 or older and delete the jury instruction requirement.[4] Appellant posits that because K.M. was 14 at the time of the June 1992 sexual assault, K.M. was required to tell her mother within six months under the law in effect at the time of the offense; thus, because there was no outcry for about three years, the evidence was legally insufficient.

The statute as amended does not increase the punishment nor change the elements of the offense that the State must prove. It merely "removes existing restrictions upon the competency of certain classes of persons as witnesses" and is, thus, a rule of procedure. *Hopt v. Utah*, 110 U.S. 574, 590, 4 S. Ct. 202, 210, 28 L. Ed. 262, 269 (1884). Further, there is no showing that the legislature intended that article 38.07 not be a rule of procedure and apply as of the date of the offense. *See generally Lindquist v. State*, 922 S.W.2d 223, 227 n.4 (Tex. App.—Austin 1996, pet. ref'd). As a rule of procedure, it applies to pending and future prosecutions. *See Zimmerman v. State*, 750 S.W.2d 194, 202-04 (Tex. Crim. App. 1988). Thus, the law in effect at the time of appellant's trial in 1997 applies, which is the version amended in 1993.

---

[4]*See* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (currently at TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1998)).

Accordingly, because K.M. was younger than 18 at the time of the offense, the one-year time limit on her outcry does not apply. We overrule appellant's sixth point.[5]

2. Sexual organ contact

In his fifth point, appellant claims that the evidence was legally insufficient to support the sexual assault conviction because K.M.'s testimony that appellant touched her "genital area" with his penis is not specific enough to prove that his penis contacted K.M.'s sexual organ in June 1992. Appellant concedes that if K.M. had testified that appellant's penis touched her "genitals" or "genitalia," the evidence would be sufficient. *See Aylor v. State*, 727 S.W.2d 727, 729-30 (Tex. App.—Austin 1987, pet. ref'd) (citing *Clark v. State*, 558 S.W.2d 887, 889 (Tex. Crim. App. 1977)).

Sexual assault is proven when the State shows that the defendant "intentionally or knowingly cause[d] the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor." TEX. PENAL CODE ANN. § 22.011(a)(2)(C) (Vernon Supp. 1998). "'[G]enitals' includes the vulva which immediately surrounds the vagina." *Clark*, 558 S.W.2d at 889. If K.M. had testified, as appellant desired, that appellant contacted her "genitals," that would have encompassed the "genital area," i.e., the area surrounding the genitals. Further, it would be untenable to find that the genital area does not include the genitals. Thus, K.M.'s testimony was legally sufficient to prove that appellant contacted her sexual organ with his penis. We overrule point five.

D. Summer of 1991 Aggravated Sexual Assaults

In his third and fourth points, appellant argues that K.M.'s testimony that appellant's penis touched her "genital area" and "pubic area" was legally insufficient to support his two convictions for aggravated sexual assault. As we stated above, "genital area" is sufficient to prove "genitals." Further, K.M. affirmed that appellant's penis was erect when "it was up against [her] genital." We need not decide whether K.M.'s testimony that appellant touched her "pubic area" was sufficient to prove "sexual organ" because K.M. also testified that appellant's penis touched her "genital area" on that occasion. We overrule points three and four.

E. Spring of 1991 Indecency With a Child

In his second point, appellant claims that the evidence was legally insufficient to uphold his conviction for indecency with a child based solely on K.M.'s testimony that appellant touched her "on the pubic hair."

---

[5]In three supplemental points, appellant asserts that this argument also applies to three of the indecency with a child counts, which occurred in March, June, and July of 1993. Because we have held that the 1993 version of the statute applied to appellant, we overrule supplemental points seven, eight, and nine.

Indecency with a child requires "sexual contact" between the victim and the defendant. TEX. PENAL CODE ANN. § 21.11 (Vernon 1994). Sexual contact is defined as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." *Id.* § 21.01(2). The external genital organs include the mons pubis, which is "the rounded eminence in front of the pubic symphysis [that] is formed by a collection of fatty tissue beneath the integument. It becomes covered with hair at the time of puberty." CHARLES M. GOSS, GRAY'S ANATOMY 1405 (26th ed. 1954). Thus, by touching K.M.'s pubic hair, appellant touched a part of her genitals. The evidence was legally sufficient and we overrule appellant's second point.

III. FAILURE TO REVEAL IMPEACHMENT EVIDENCE

In his first point, appellant argues that the trial court should have granted him a new trial because the State failed to disclose that Eleanor had another man's child while appellant was in prison. The State does not dispute that it did not disclose this evidence to appellant.

We review the denial of a motion for new trial based on newly-discovered evidence under an abuse of discretion standard. *See Driggers v. State*, 940 S.W.2d 699, 709 (Tex. App.—Texarkana 1996, pet. ref'd) (op. on reh'g). The State must produce exculpatory as well as impeachment evidence to a

defendant. *See Kyles v. Whitley*, 514 U.S. 419, ___, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 505 (1995). *See generally Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). However, the record must reflect that (1) the newly-discovered evidence was unknown to the movant at the time of trial; (2) the movant's failure to discover the evidence was not due to his want of diligence; (3) the evidence was admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the evidence was probably true and would probably bring about a different result in another trial. *See Moore v. State*, 882 S.W.2d 844, 849 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1114 (1995); *see also Gowan v. State*, 927 S.W.2d 246, 249 (Tex. App.—Fort Worth 1996, pet. ref'd).

Any evidence showing Eleanor's sexual relationship with another man and proving that she had his baby would be inadmissible as impeachment evidence. *See* TEX. R. CRIM. EVID. 608(b); *Ramos v. State*, 819 S.W.2d 939, 942 (Tex. App.—Corpus Christi 1991, pet. ref'd). Because the evidence was inadmissible, the State did not have to produce it, and the trial court did not abuse its discretion in not allowing its admission. We overrule point one.

IV. Conclusion

Because we find that the evidence was legally sufficient and the trial court did not abuse its discretion in denying appellant's motion for new trial, we affirm the trial court's judgments.[6]

PER CURIAM

PANEL F: HOLMAN, J.; CAYCE, C.J.; and DAY, J.

PUBLISH

FEB 12 1998

[6]Appellant has filed a letter asking us to reprimand or replace his court-appointed attorney. His only complaint with counsel is that counsel is not communicating with him. Unless an appellant waives counsel and chooses to represent himself or shows an adequate reason for new counsel, appellant must accept the counsel appointed by the court. *See Halliburton v. State*, 928 S.W.2d 650, 651-52 (Tex. App.—San Antonio 1996, pet. ref'd); *see also Hubbard v. State*, 739 S.W.2d 341, 344 (Tex. Crim. App. 1987). Appellant has done neither, and we deny his requests.

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-97-197-CR

SCOTT LESLIE CARMELL — APPELLANT

VS.

THE STATE OF TEXAS — STATE

FROM THE 367TH DISTRICT COURT OF DENTON COUNTY

ORDER

We have considered the "Appellant's Motion For Rehearing."

It is the opinion of the court that the rehearing should be and is hereby denied and that the opinion and judgment of February 12, 1998 stand unchanged.

The clerk of this court is directed to transmit a copy of this order to the attorneys of record.

DATED THIS 26th day of March, 1998.

PER CURIAM

PANEL F: HOLMAN, J.; CAYCE, C.J.; and DAY, J.

PETITIONER'S APPENDIX-B

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

September 16, 1998
COA#: 02-97-00197-CR
RE: Case No. 0837-98
STYLE: CARMELL, SCOTT LESLIE

On this day, the Appellant's Pro Se Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

INTERAGENCY MAIL

SCOTT LESLIE CARMELL
TDCJINMATE #777548
2101 FM 369 NORTH
ALLRED UNIT - UNIT #069
IOWA PARK TX 76367

38-04

9/25/98

PETITIONER'S APPENDIX-C

BEST AVAILABLE COPY

No. 98-7540

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SCOTT L. CARMELL — PETITIONER
(Your Name)

VS.

THE STATE OF TEXAS — RESPONDENT(S)

PROOF OF SERVICE

I, Scott L. Carmell, do swear or declare that on this date, December 1 —, 1998, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Mr. Dan Morales, Attorney General, State of Texas,

P.O. Box 12548, Capitol Station, Austin, Texas 78711.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Dec. 1, 1998

Scott L. Carmell
(Signature)

ORIGINAL

No. 98-7540

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

SCOTT LESLIE CARMELL,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari
To the Court of Appeals for the Second District of Texas

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through the Attorney General of Texas, and files this Brief in Opposition to Petition for Writ of Certiorari.[1]

OPINION BELOW

The Court of Appeals for the Second District of Texas affirmed Carmell's convictions for eight counts of indecency with a child, two counts of aggravated sexual assault, and five counts of sexual assault on February 12, 1998. *Carmell v. State*, 963 S.W.2d 833 (Tex.App.-Fort Worth 1998, pet. ref'd), Appendix A to Petition. His motion for rehearing and subsequent petition for discretionary review by the Texas Court of Criminal Appeals were

[1] For clarity, the respondent will be referred to as "the state" and the petitioner as "Carmell."

overruled and refused, respectively, without written order.

JURISDICTION

Carmell seeks to invoke the Court's jurisdiction under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Carmell bases his claims upon Article I, Section 10 of the United States Constitution and the fifth, sixth and fourteenth amendments to the United States Constitution.

STATEMENT OF CASE

A. Course of Proceedings and Disposition Below

Carmell was indicted for the offenses of indecency with a child (eight counts), aggravated sexual assault (two counts) and sexual assault (five counts). Tr 2-7.[2] Carmell pleaded not guilty to all counts, was tried before a jury in the 367th Judicial District Court of Denton County, Texas, and on January 14, 1997, was found him guilty of all fifteen counts. Tr 140-99. The jury assessed Carmell's punishment at imprisonment for twenty years for each of the indecency-with-a-child and the sexual-assault counts and imprisonment for life for the aggravated-sexual-assault counts, sentences for all counts to be served concurrently. Tr 140-99.

Carmell appealed his convictions to the Court of Appeals for the Second District of Texas, which affirmed on February 12, 1998. *Carmell v. State*, 963 S.W.2d 833 (Tex. App.-Fort Worth 1998, pet. ref'd). The court overruled Carmell's motion for rehearing on March 26, 1998, and the Texas Court of Criminal Appeals refused Carmell's petition for

[2] "Tr" refers to the transcript of trial papers filed with the court during Carmell's trial, preceded by volume number and followed by page number. "SR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page number.

discretionary review (PDR) on September 16, 1998. *Carmell v. State*, No. 837-98. Carmell's petition for writ of certiorari followed.

B. Statement of Facts

The state court of appeals' opinion summarizes the facts of the case as follows:

> Ron Borchert and Eleanor Alexander married in 1972. K.M. was born on March 24, 1978. Eleanor began to see [Carmell], a counselor specializing in counseling victims of incest, because she was an incest survivor. In early 1987, Eleanor divorced Ron and married [Carmell] the next year.
>
> By the time K.M. was twelve, [Carmell] would give her a back rub every night after she said her prayers. Soon the back rubs changed, and [Carmell] would tell K.M. to take her shirt off and pull her shorts down a little. In the spring of 1991, [Carmell] touched her "on the pubic hair" during one of the back rubs. [Carmell] then decided that he and K.M. needed to "date" and spend every Tuesday night together. This included sleeping in the same bed. [Carmell] claimed that this was part of the family's bonding process.
>
> In the summer of 1991, [Carmell] took his clothes off, got in a sleeping bag with K.M., and pulled her on top of him. He put his erect penis between her legs, and his penis touched her "genital area." Later that summer, [Carmell] and K.M. were sleeping together nude when [Carmell] pulled K.M. on top of him. He put his erect penis between her legs and pushed against her "pubic" or "genital" area. In June 1992, [Carmell] took K.M. into his bedroom for a "nap." They undressed, and [Carmell] pulled her on top of his erect penis, touching her "genital area."
>
> These incidents and more finally led to [Carmell] having sex with K.M. in September 1993. Two days later, [Carmell] "married" K.M. in a mock ceremony and continued having sex with her until early 1995. K.M. finally told her mother about the long-term abuse, and her mother took her to the police. At trial, Eleanor testified that once while she visited [Carmell] in jail, he wrote "adultery with [K.M.]" on a piece of paper when she told him that he needed to confess if he was sorry for what he had done to K.M.

Carmell v. State, 963 S.W.2d at 835 (footnote omitted).

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefor. Carmell fails to advance a compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II. THE APPLICATION OF THE AMENDED VERSION OF ARTICLE 38.07 OF THE TEXAS CODE OF CRIMINAL PROCEDURE TO AN OFFENSE WHICH OCCURRED PRIOR TO THE AMENDMENT DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE.

Carmell contends that the Texas court's application of the 1993 amended version of Article 38.07 of the Texas Code of Criminal Procedure to an offense committed in 1992,[3] prior to the amendment,[4] violated the *Ex Post Facto* Clause and the fifth and fourteenth amendments to the United States Constitution. Petition for Writ of Certiorari, hereinafter "Petition," at 4. Carmell alleges that the application of the amended version of Article 38.07 deprived him of a defense and reduced the state's burden of proof. Petition at 5-6. However, the Texas court's application of the amended version of article 38.07 did not violate *ex post*

---

[3] Carmell complains only about his conviction for sexual assault (count seven) committed on or about June 1, 1992. Petition at 4. The amended version of article 38.07 was also retroactively applied to three of the indecency-with-a-child counts (counts eight, nine, and ten) committed on or about March 1, 1993, June 1, 1993, and April 1, 1993, respectively. *See Carmell v. State*, 963 S.W.2d at 836 n.5.

[4] The amended version of the statute was effective on September 1, 1993.

facto principles, and the court below correctly concluded that Carmell is not entitled to a reversal of his conviction on this basis.

The version of Article 38.07 in effect on June 1, 1992, the date of the sexual assault offense in question, provided as follows:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense. The court shall instruct the jury that the time which lapsed between the alleged offense and the time it was reported shall be considered by the jury only for the purpose of assessing the weight to be given to the testimony of the victim.

TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 1992). Effective September 1, 1993, Article 38.07 was amended to provide as follows:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 18 years of age at the time of the alleged offense.

TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 1994). Thus, corroboration of a fourteen-year-old victim's testimony was no longer required at the time of Carmell's 1997 trial, even when the victim had not made an outcry for several years.

The victim of the offense in question was fourteen years old on June 1, 1992, the date of the offense, and did not make an outcry until March of 1995. 9 SR 58, 162; 10 SR 278-79. Carmell asserts that the application of the amended statute to an offense committed prior to the amendment constituted an *ex post facto* violation. Specifically, Carmell argues that,

had the 1992 version of the statute been applied, he would have been entitled to an acquittal at trial or on direct appeal.[5] Petition at 5-6.

Article I, Section 10 of the United States Constitution forbids the states to pass *ex post facto* laws. This Court has squarely rejected the proposition that retroactive changes in law violate the *Ex Post Facto* Clause merely because they adversely affect the position of criminal defendants. *Collins v. Youngblood*, 497 U.S. 37, 45 (1990); *Dobbert v. Florida*, 432 U.S. 282, 293-94 (1977); *Beazell v. Ohio*, 269 U.S. 167, 170-71 (1925). Rather, "the Clause is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" *California Dept. of Corrections, v. Morales*, 514 U.S. 499, 504 (1995), (quoting *Collins*, 497 U.S. at 43). The constitutional prohibition against *ex post facto* laws is triggered only by changes in law which: (1) punish as a crime an act previously committed which was innocent when done; (2) make more burdensome the punishment for a crime, after its commission; or (3) deprive one charged with a crime of a defense available according to law at the time the act was committed. *Collins*, 497 U.S. at 52.

Plainly, the amended version of Article 38.07 neither criminalizes previously innocent conduct, nor enhances the punishment for an existing crime, nor renders unavailable to Carmell a defense that was available at the time he committed the offense. Carmell does not contend that the application of the amended version of the statute effected a change in the definition of the offense he committed or altered the punishment he could receive for that offense. Instead, he argues that he was deprived of an affirmative defense. Petition at 5-6.

---

[5] On direct appeal, Carmell asserted that the trial court committed reversible error when it denied his motion for an instructed verdict due to insufficient evidence because there was no outcry until years after the offenses and there was no corroborating evidence. *Carmell v. State*, 963 S.W.2d at 835-36.

Carmell's attempt to characterize the statutory requirement of corroboration in cases where there was no outcry within six months as a defense, whose retroactive abolition would fall within the ambit of *Collins*, is unavailing. Carmell's "use of the word 'defense' carries a meaning quite different from that which appears in . . . *Beazell*, where the term was linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.'" *Collins*, 497 U.S. at 50 (quoting *Beazell*, 269 U.S. at 169-70). The "defense" Carmell claims was available to him under prior Texas law was not one related to the definition of the crime; rather, it was based on the law regulating sufficiency of the evidence. *See* Petition at 6 (citing *Sloggan v. State*, 799 S.W.2d 679, 683 (Tex. Crim. App. 1990)). By applying the version of Article 38.07 in effect at the time of Carmell's trial, Texas did not change the elements of the offense, "or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge . . . ." *Collins*, 497 U.S. at 50.[6] Thus, application of the amended version of Article 38.07 did not violate the constitutional prohibition against *ex post facto* laws, as the state court of appeals correctly determined. Because this allegation requires only the application

---

[6] In *Hopt v. Utah*, 110 U.S. 574 (1984), this Court rejected an *ex post facto* challenge to the retroactive application of a statute making felons competent to testify. However, the Court went on to opine that "[a]ny statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, *might*, in respect of that offense, be obnoxious to the constitutional inhibition upon ex post facto laws." *Id.* at 590 (emphasis added). This language is mere dicta and, in any event, did not survive the Court's opinion in *Collins*, whose definition of ex post facto violations does not include changes in evidentiary rules. *Collins*, 497 U.S. at 42-43; *see, e.g., Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (civil commitment statute does not apply retroactively because it is based on offender's current mental state, and "[t]o the extent that past behavior is taken into account, it is used . . . solely for evidentiary purposes").

of settled law to the facts of the case, it does not warrant exercise of this court's certiorari jurisdiction. *United States v. Johnson*, 268 U.S. 220, 227 (1925).

III. CARMELL'S SIXTH AMENDMENT CLAIM IS NOT PROPERLY BEFORE THE COURT.

Carmell alleges that his sixth amendment right of confrontation was violated because the state court of appeals erred in concluding that "evidentiary criminal rule 608(b) was properly dispositive of the prosecutor's intentionally withholding evidence that was favorable to the accused . . . ." Petition at 7. This claim is not properly before the Court because it was not presented to the court below.

This Court has consistently held that it will not decide issues raised for the first time on petition for certiorari and that the Court will not decide federal questions not raised properly and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919).

In his brief in the state court of appeals, Carmell alleged that the prosecution failed to disclose material impeachment evidence in violation of the Due Process Clause of the fourteenth amendment as construed in *Brady v. Maryland*, 373 U.S. 83 (1963). Appellant's Brief, attached hereto as Appendix A, at 3-5. The court of appeals rejected this claim because the evidence was inadmissible as a matter of state law under Rule 608(b) of the Texas Rules of Evidence. *Carmell v. State*, 963 S.W.2d at 838. "Because the evidence was inadmissible, the State did not have to produce it . . . ." *Id.*

Thereafter, in his PDR to the Court of Criminal Appeals, Carmell alleged that the state's failure to disclose this evidence violated his sixth amendment confrontation rights as construed in *Davis v. Alaska*, 415 U.S. 308 (1974). Appellant's Pro Se Petition for Discretionary Review, attached hereto as Appendix B, at 609. His petition for writ of certiorari likewise relies on *Davis* and asserts a Confrontation Clause violation. Petition at 7-10.

Because Carmell did not raise his sixth amendment claim in the state court of appeals, it is not properly before this court. Moreover, that he raised it in his PDR in the Court of Criminal Appeals is insufficient to allow this Court to consider it. Under Texas law, the Court of Criminal Appeals may not grant discretionary review on an issue that was not presented to the court of appeals. *Lambrecht v. State*, 681 S.W.2d 614, 616 (Tex. Crim. App. 1984); *Ayala v. State*, 633 S.W.2d 526, 528 (Tex. Crim. App. 1982); *see Castille v. Peoples*, 489 U.S. 346, 351 (1989) (raising a claim for the first time in a petition to Pennsylvania's highest court on discretionary review did not constitute a "fair presentation" of the claim to satisfy the requirement that a federal habeas petitioner exhaust his state remedies). Because Carmell's brief in the court of appeals relied solely on the Due Process Clause of the fourteenth amendment rather than the Confrontation Clause of the sixth amendment, the sixth amendment issue raised in his PDR was not properly before the Court of Criminal Appeals. Carmell's failure to present his confrontation claim at the proper point in the state court proceedings bars review of it in this Court. *Beck v. Washington, supra; Godchaux Co., Inc. v. Estopinal, supra.*

IV. THE STATE COURT CORRECTLY DENIED CARMELL'S ALLEGATION THAT THE STATE WITHHELD IMPEACHMENT EVIDENCE AGAINST A STATE'S WITNESS IN VIOLATION OF *BRADY V. MARYLAND*, 373 U.S. 83 (1963).

Carmell alleges that his fourteenth amendment rights were violated because the court of appeals of Texas erred in concluding that "evidentiary criminal rule 608(b) was properly dispositive of the prosecutor's intentionally withholding evidence that was favorable to the accused . . . ." Petition at 7. Because Carmell's confrontation claim is not properly before the Court, the only conceivable basis for certiorari jurisdiction on this allegation is the claim that he pressed in the state court of appeals, *i.e.*, a violation of *Brady v. Maryland*. Because Carmell's petition for writ of certiorari is silent as to *Brady* and the Due Process Clause, however, it likewise is doubtful that that claim is properly before the Court. Assuming *arguendo* that it is, it is far too insubstantial to warrant exercise of the Court's jurisdiction.

Carmell argues that the state intentionally withheld evidence favorable to his defense, specifically, the fact that Carmell's wife, Eleanor, the mother of the victim, bore another man's child while Carmell was in jail awaiting trial. Petition at 8. The state court of appeals found that under Rule 608(b) of the Texas Rules of Criminal Evidence, "[a]ny evidence showing Eleanor's sexual relationship with another man and proving that she had his baby would be inadmissible as impeachment evidence," thus, the state did not have to produce the evidence. *Carmell v. State*, 963 S.W.2d at 838. To the extent Carmell complains about the state court's interpretation of Rule 608(b) of the Texas Rules of Criminal Evidence, he has failed to state a claim worthy of this court's review. *See Moran v. Burbine*, 475 U.S. 412, 429 n.3 (1986) (the Court may not disregard a state court's interpretation of state law); *California v. Freeman*, 488 U.S. 1311, 1313-15 (1989) ("Interpretations of state law by a State's highest court are, of course, binding upon this Court."). To the extent Carmell argues

that the state court incorrectly denied his allegation that the state withheld impeachment evidence against a state's witness in violation of *Brady*, his claim is not worthy of this Court's review.

Under *Brady*, the state has an affirmative duty to disclose to the defense evidence that is both favorable to the accused and material either to guilt or to punishment. *United States v. Bagley*, 473 U.S. 667, 674 (1985). Such favorable evidence includes impeachment evidence. *Id.* at 676. Further, the prosecutor's good or bad faith is irrelevant to the question of whether the state violated a defendant's rights under *Brady*. *See United States v. Agurs*, 427 U.S. 97, 110 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").

To succeed on a *Brady* claim, the petitioner must establish: (1) the prosecution suppressed evidence; (2) the evidence was favorable; and (3) the evidence was material either to guilt or punishment. *Brady*, 373 U.S. at 87. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A "reasonable probability" is a probability sufficient to undermine confidence in the trial's outcome. *Id.* Further, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-10. Rather, the petitioner must show that the evidence in question could reasonably be taken to put the whole case in a different light so as to undermine confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

In this case, the prosecutor admitted that while the jury was out deliberating on Carmell's guilt or innocence, Carmell's attorney had asked her if a baby that he had observed

belonged to either Carmell's wife, Eleanor, or her daughter, the victim, Michelle, and the prosecutor lied and told Carmell's attorney that the baby belonged to a witness. Tr 260-61. The prosecutor also admitted that she knew Eleanor had become pregnant and given birth to another man's child approximately eight months before the trial in question and that she did not inform Carmell's attorney. Tr 261. Carmell's attorney discovered that the baby was actually Eleanor's child prior to the commencement of the punishment phase of the trial. 12 SR 5-6. During the punishment phase, the trial court would not allow Carmell's attorney to elicit any testimony regarding the baby. 12 SR 24-25; 13 SR 149-53. Carmell asserts that evidence of the baby's paternity should have been admitted as impeachment evidence to show that Eleanor's testimony was not credible and that she had a motive for testifying against him. Petition at 8-10.

Because the state court of appeals found that the undisclosed evidence was inadmissible, it could not have had a direct affect on the outcome of the trial. *See Wood v. Bartholomew*, 516 S. Ct. 1, 6 (1995) (disclosure of inadmissible polygraph results "could have had no direct effect on the outcome of the trial, because respondent could have made no mention of them either during argument or while questioning witnesses"). Carmell has not specified any admissible evidence to which the disclosure of the baby's parentage would have led.

It is unreasonable to believe that the jury would have reached a different outcome had it been informed that Eleanor, the victim's mother, had another man's baby. Eleanor testified that Carmell was already in jail on the charges in question when the child was conceived. 13 SR 152. Carmell's attorney even admitted that the evidence indicated that Carmell was guilty of at least some of the counts. 11 SR 367. Because a *Brady* materiality analysis must be performed in the context of an objectively reasonable jury, this Court in

Bagley adopted the *Strickland*[7] prejudice test to evaluate the materiality of suppressed evidence. *Bagley*, 473 U.S. at 682. The *Strickland* Court explained,

> [t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 695.

The victim testified at length about the ongoing sexual abuse by her stepfather, Carmell, beginning when she was approximately twelve years old. 9 SR 72-76, 80-123, 131-42, 145-47, 158-59. Eleanor, the victim's mother, testified that Carmell admitted that he had committed "adultery with Michelle." 10 SR 283. Thus, in light of the abundant evidence supporting the conviction, suppression of the inadmissible evidence that the mother of the victim had given birth to another man's baby while Carmell was in prison awaiting trial did not deprive Carmell of a fair trial. Because this allegation requires only the application of settled law to the facts of the case, it does not warrant exercise of this court's certiorari jurisdiction. *United States v. Johnson*, 268 U.S. at 227.

V. CARMELL'S INSUFFICIENCY CLAIM IS TOO INSUBSTANTIAL TO WARRANT CERTIORARI REVIEW.

Finally, Carmell contends that the evidence is insufficient to support four of his convictions. Specifically, he argues that the victim's testimony that his penis touched her "genital area" or "pubic hair" does not satisfy the Texas statutes proscribing sexual assault and aggravated sexual assault of a child, and indecency with a child, which require contact

---

[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

with the "sexual organ" and "any part of the genitals" of the child, respectively. Petition at 10-13.

It is true that a claim of insufficient evidence presents a federal constitutional claim. *Jackson v. Virginia*, 443 U.S. 307, 322 (1979). Nonetheless, Carmell's contention involves nothing more than an unremarkable interpretation of the terms of a state penal statute. *See Carmell v. State*, 963 S.W.2d at 837 (the state court of appeals found that the victim's testimony that Malone contacted her "genital area" and/or "pubic hair" is sufficient to prove Malone contacted the victim's "genitals"). Carmell does not allege a failure of the state to prove that he engaged in the conduct in question; instead, his only submission is that the court below misconstrued state law in measuring his conduct against the applicable statutes. As such it is manifestly insufficient to warrant exercise of the Court's certiorari jurisdiction. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *Brown v. Collins*, 937 F.2d 175, 181 (5th Cir. 1991) (in reviewing claim of insufficient evidence, "[w]e do no police every minutiae in state criminal procedural activity.").

CONCLUSION

For the foregoing reasons, the state respectfully requests this Court to deny Carmell's petition for writ of certiorari.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

SHANE PHELPS
Deputy Attorney General
for Criminal Justice

WILLIAM C. ZAPALAC
Assistant Attorney General
Chief, Habeas Corpus Division

CHARLES A. PALMER*
Assistant Attorney General

MICHELLE D. ROCHE
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1429
(512) 320-8132 (Fax)

*Counsel of Record

ATTORNEYS FOR RESPONDENT

CAUSE NUMBER 02-97-00197-CR

IN THE

COURT OF APPEALS

FOR THE

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH, TEXAS

****

SCOTT LESLIE CARMELL,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

****

ON APPEAL FROM THE 367TH DISTRICT COURT, DENTON COUNTY, TEXAS

CAUSE NUMBER F-96-1227-E

THE HONORABLE LEE GABRIEL, JUDGE PRESIDING

****

APPELLANT'S BRIEF

****

APPELLANT DOES NOT
REQUEST ORAL ARGUMENT

William F. Street
State Bar Number 00791742
P.O. Box 917
Denton, Texas 76202
(940) 891-1985
FAX: (940) 891-1974

ATTORNEY FOR
APPELLANT

APPENDIX A

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES:

CODES:

MISCELLANEOUS:

CAUSE NUMBER 02-97-00197-CR

IN THE

COURT OF APPEALS

FOR THE

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH, TEXAS

****

SCOTT LESLIE CARMELL,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

****

CERTIFICATE OF THE PARTIES

In accordance with Tex.R.App.P. 74(a), the following is a list of the parties in this cause:

(1) Scott Leslie Carmell
TDC # 777548, Allred Unit
2101 F.M. 369 N.
Iowa Park, Texas 76367

(2) Denton County Criminal District Attorney's Office
401 West Hickory Street
J. Carroll Courts Building
Denton, Texas 76201
counsel for Appellee

(3) William F. Street
P.O. Box 917
Denton, Texas 76202
counsel for Appellant

CAUSE NUMBER 02-97-00197-CR

IN THE

COURT OF APPEALS

FOR THE

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH, TEXAS

****

SCOTT LESLIE CARMELL,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

****

APPELLANT'S BRIEF

****

TO THE HONORABLE JUDGES OF THE FORT WORTH COURT OF APPEALS:

BRIEF STATEMENT OF THE CASE

Appellant entered pleas of not guilty to the offenses of aggravated sexual assault (two counts), sexual assault (five counts), and indecency with a child (eight counts). All fifteen offenses were charged on the same indictment and tried together. The jury found Appellant guilty of all charges, and assessed punishment at two life sentences and thirteen twenty year sentences. Appellant was formally sentenced on January 14, 1997; and his Motion for New Trial was denied on March 24, 1997. Appellant timely gave notice of appeal on April 2, 1997.

POINTS OF ERROR

I. POINT OF ERROR NUMBER ONE

A. The Trial Court erred in not granting Appellant's motion for new trial based upon the failure of the prosecution to reveal the impeaching evidence which would have seriously undermined the prosecution's case. (The complained of error can be found at Tr. 225.)

B. Argument and Authorities

Approximately four weeks before trial, Appellant's trial counsel filed, and the Trial Court granted, a proper Motion for Discovery. (Tr. at 227). In spite of the Court's order, and in violation of the long-standing legal precedent originating with Brady v. Maryland, 373 U.S. 83 (1963), the State failed to disclose that one of its key witnesses, the wife of Appellant and mother of the complaining witness, had born a child while Appellant was incarcerated awaiting trial; and that the child was not that of her husband, the Appellant.

This information was obviously valuable to the Appellant as impeachment evidence. However, it was not revealed to the Defendant until the jury was deliberating at the guilt/innocence phase of the trial, and then only by accident when the witness's divorce attorney approached Appellant's trial attorney to discuss waiving paternity. In fact, the prosecution had deliberately lied to Appellant's trial counsel when specifically asked if the witness was the baby's mother. The State's attorney admits to withholding the information and lying to Appellant's trial counsel. (Tr. at 260-262.)

Under Brady, a prosecutor has an affirmative duty to turn over to the defense any evidence which is material and exculpatory. See also, Means v. State, 429 S.W.2d 490, 495

(Tex.Crim.App. 1968). Under U.S. v. Bagley, 473 U.S. 667, 676 (1985), the term "exculpatory evidence" includes any evidence which could be used to impeach the State's witness. This Court recently applied the Bagley rule in Johnston v. State, 917 S.W.2d 135, 138 (Tex.App. — Fort Worth 1996, pet. ref'd), holding that evidence that impeaches the State's witness must be disclosed, and a failure to do so violates Brady.

In order to prevail on his Brady claim the Appellant is not required to show bad faith, or even specific knowledge, on the part of the prosecutor. "[I]nformation possessed by an agent of the State is attributed to the prosecutor, even without any intention to engage in misconduct on the part of the prosecutor." Johnston v. State, 917 S.W.2d at 138 (citing Reed v. State, 644 S.W.2d 494, 498-99 (Tex.App. — Corpus Christi 1982, pet. ref'd); Means v. State, 429 S.W.2d 490, 494 (Tex.Crim.App. 1968)). Thus, the prosecutor's proffered excuses for withholding the information (Tr. at 261-262) are moot.

The law is clear that impeachment evidence is material for purposes of the Brady analysis. For example, in Thomas v. State, 841 S.W.2d 399, 405 (Tex.Crim.App. 1992), the Court of Criminal Appeals noted that because the withheld evidence tended to cast doubt upon the reliability of the State's only witnesses, it would have undermined the State's case and was thus material. "Evidence such as that relating to the credibility of a witness whose testimony may be determinative of guilt or innocence is considered to be material." 2 Texas Criminal Practice Guide § 62.03[1][b] (1997). In the case at bar, this was one of the State's principal witnesses. Her testimony on direct and re-direct runs to some 85 pages, second in length only to the testimony of the complaining witness. Perhaps most damaging is her testimony that the Appellant allegedly confessed to her that he had sex with the complaining witness. (S.O.F. Vol. at 283.)

"Evidence withheld by a prosecutor is 'material' if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. . . . A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome of the trial." McFarland v. State, 928 S.W.2d 482, 511 (Tex.Crim.App. 1996), cert. denied, 117 S.Ct. 966 (1997).

A due process violation requiring reversal occurs when a prosecutor: (1) fails to disclose evidence, (2) favorable to the accused, (3) which creates a probability of a different outcome. Id. Each of these three prongs of the Brady test is met in the case at bar, and it was thus reversible error for the trial court to deny Appellant's motion for new trial.

II. POINT OF ERROR NUMBER TWO

A. The trial court committed reversible error when it denied Appellant's motion for an instructed verdict on Count One because there was insufficient evidence to support a conviction. (The complained of error can be found at S.O.F. Vol. 10 at 373.)

B. Argument and Authorities

Count One charged the Appellant with Indecency with a Child under TEX.PENAL CODE § 21.11(a)(1), by sexual contact as that term is defined in TEX.PENAL CODE §21.01(2). Specifically, Count One of the indictment alleges that the Appellant "touch[ed] the genitals" of the complaining witness. (Tr. at 2.) TEX.PENAL CODE §21.01(2) defines "sexual contact" as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person."

At trial, the following testimony was elicited on direct examination from the State's chief witness:

Q. Referring to count one, during one of the back rubs did Scott Carmell ever actually touch your genitals?
A. Yes, he did.
Q. How was it that he touched the genitals?
A. *Well, just on the pubic hair.*
Q. Okay. And the — the time that we're talking about, this happened in the spring of 1991 before your 13th birthday?
A. Yes.
Q. And was it while you were in the sixth grade?
A. Yes.
Q. Going to count two. . . .

(S.O.F. Vol. 9 at 80; emphasis added.) This brief exchange was the only evidence offered to prove Count One. The question, then, is whether this evidence is sufficient to prove that Appellant touched "any part" of the complaining witness's "genitals."

The Texas Court of Criminal Appeals, examining the very statute at issue here, held that the word genitals "includes more than just the vagina in its definition; the definition of 'genitals' includes the vulva which immediately surrounds the vagina." Clark v. State, 558 S.W.2d 887 (Tex.Crim.App. 1977)(citing Ball v. State, 289 S.W.2d 926 (Tex.Crim.App. 1956); Pendell v. State, 253 S.W.2d 426 (Tex.Crim.App.1952)). However, the State's witness did not testify that the Appellant touched her vagina, or her vulva, or even her "genitals." She testified only that the Appellant touched her "pubic hair."

Appellant can find no Texas authority for the proposition that the term "genitals" includes "pubic hair." As a practical matter, such an expanded definition of the statutory term "genitals" would lead to uneven results. For example, §21.01 also defines "deviate sexual intercourse" as "the penetration of the genitals . . . of another person with an object." TEX.PENAL CODE §21.01(1)(B). It seems unlikely that the Legislature was contemplating "pubic hair" when this statute was drafted, especially considering that some individuals are more hirsute than others. For

example, if a man's lower abdomen, from the umbilicus downward, is covered with hair, would it be an act of "deviate sexual intercourse" punishable as "public lewdness" under TEX.PENAL CODE §21.07 for his wife to intertwine her fingers in the hair near his umbilicus while they lay sunbathing at the beach? If not, how does the law propose to delineate which hairs are "pubic hairs" and which hairs are not?

The only practical means would be to define "pubic hairs" as those within a prescribed distance from some specific point on the human anatomy. In fact, defining the term "genitals" in some such more precise manner would seem to be the best solutuion to such problems; regardless of whether the area contains hair or not. But that is not what the Legislature has done. It has chosen to use the term "genitals," and the courts must provide the definition of this term. This Court should not conclude that the term includes "pubic hair."

Without further evidence of "sexual contact" by the touching of "any part of the genitals" of the complaining witness, the conviction on Count One cannot stand.

III. POINT OF ERROR NUMBER THREE

A. The trial court committed reversible error when it denied Appellant's motion for an instructed verdict on Count Three because there was insufficient evidence to support a conviction. (The complained of error can be found at S.O.F. Vol. 10 at 373.)

B. Argument and Authorities

Count Three charged the Appellant with aggravated sexual assault under TEX.PENAL CODE § 22.021, which states in relevant part, "[a] person commits an offense if the person intentionally or knowingly causes the sexual organ of a child to contact . . . the . . . sexual organ of another person, including the actor; and if the victim is younger than 14 years of age."

Specifically, Count Three of the indictment alleges that the Appellant "cause[d] the sexual organ of [the complaining witness] . . . to contact the sexual organ of the defendant." (Tr. at 3.)

At trial, the following testimony regarding Count Three was elicited on direct examination from the State's chief witness:

Q. Okay. What happened after you laid down in the sleeping bags together to go to sleep?
A. He pulled me on top of him.
Q. Okay. Was this before or after he had taken his shorts off?
A. This was after.
Q. When he pulled you on top of him, what did he do?
A. He — he put his penis between my legs.
Q. Okay. What part of your body did his penis touch?
A. *Genital area.*

(S.O.F. Vol. 9 at 90-91; emphasis added.) This testimony was the only evidence offered to prove the essential element of Count Three; i.e., that the Appellant had caused the witness's "sexual organ" to contact his own "sexual organ." The question, then, is whether testimony that a person's penis touched the "genital area" of another person is sufficient to prove that the first person's "sexual organ" contacted the "sexual organ" of the second person.

There can be no doubt that the penis is part of the male "sexual organ," so testimony regarding what the penis touched will be sufficient to prove a portion of the element of the offense. In other words, the witness is surely testifying that the Appellant's sexual organ touched her *somewhere*. But is she testifying that it touched *her* "sexual organ"?

Had she testified that it touched her "genitals," the question would not be presented. As noted above, "The Court of Criminal Appeals has held that 'genitals' includes more than the 'vagina'; it includes the vulva or tissue immediately surrounding the vagina. We detect no difference in the term 'genitals' or 'genitalia,' and 'female *sex organ*.'" Aylor v. State, 727

S.W.2d 727, 729-30 (Tex.App. — Austin 1987, pet. ref'd)(citing Clark v. State, 558 S.W.2d at 889)(emphasis added)). In short, had the witness testified that the Appellant's penis touched her "genitals" or "genitalia," Clark and Aylor would control and there would be no question of sufficiency of the evidence on this element. But the witness did not so testify. Instead, it was her testimony that the Appellant's penis touched her "genital area." The State's attorneys are well aware of the language of the statute, and are certainly capable of eliciting the required testimony from their witnesses. In fact, the witness testified that she had met with the State's attorneys prior to the trial in order to rehearse her testimony. (S.O.F. Vol. 9 at 77.)

There are, of course, numerous sex offense cases holding that medical precision is not required in the testimony of victim witnesses. These cases usually involve young children, the mentally handicapped, or others who, for one reason or another, simply cannot be expected to testify with the detailed vocabulary and detached emotions of a statute. However, in the case at bar, the complaining witness was a grown young woman, nearly nineteen years old, who was attending college. In other portions of the trial, she had no difficulty correctly and unabashedly using such terms as "pubic hair" (S.O.F. Vol. 9 at 80), "penis" (S.O.F. Vol. 9 at 91, 93, 104, 105, 112, 121, 146), "breasts" (S.O.F. Vol. 9 at 99, 102, 116), "condom" (S.O.F. Vol. 9 at 119, 136), and "having sex" (S.O.F. Vol. 9 at 132, 146). Furthermore, she testified that she did not need definitions of "erection" and "ejaculation" when the State's attorney used the words in direct examination, (S.O.F. Vol. 9 at 91, 95). Finally, the very fact that she used the phrase "genital area" suggests that she knew the word "genitals" well enough.

Does the phrase "genital area," as used by the witness, mean the area around and *including* the genitals? Or was she using the phrase to indicate that the contact was in the general

vicinity of, *but not on*, her genitals? Given that this is the central, essential element of the most serious offense charged, due process and fundamental fairness demands that a witness with this level of sophistication use language that conclusively proves the point in order to support the conviction. Anything less cannot be sufficient evidence. There was no reason this witness could not use the appropriate terms in her testimony. She obviously knew them and was capable of using them correctly, unlike a child or mentally handicapped person. The State had ample opportunity to elicit precise testimony to prove this element, and failed to do so. Uncorroborated testimony that the defendant's "penis" touched the witness's "genital area" should not, as a matter of law, be sufficient to support the conviction.

IV. POINT OF ERROR NUMBER FOUR

A. The trial court committed reversible error when it denied Appellant's motion for an instructed verdict on Count Four because there was insufficient evidence to support a conviction. (The complained of error can be found at S.O.F. Vol. 10 at 373.)

B. Argument and Authorities

Appellant incorporates by reference the argument and authorities section under Point of Error Number Three inasmuch as it relates to this Point of Error.

Count Four, like Count Three, charged the Appellant with aggravated sexual assault under TEX.PENAL CODE § 22.021. Also like Count Three, Count Four of the indictment alleges that the Appellant "cause[d] the sexual organ of [the complaining witness] . . . to contact the sexual organ of the defendant." (Tr. at 3.)

At trial, the following testimony regarding Count Four was elicited on direct examination from the State's chief witness:

Q. What did he do after pulling you on top of him?
A. Same thing. Put his penis between my legs.
Q. Did he do anything with his penis after he pulled you on top of him this time?
A. He pushed up against my *pubic area*.

* * * * * * * *

Q. What part — part of your body did his penis make contact with?
A. *Genital area*.

(S.O.F. Vol. 9 at 92-93, 95; emphasis added.) This testimony was the only evidence offered to prove the essential element of Count Four; i.e., that the Appellant had caused the witness's "sexual organ" to contact his own "sexual organ." As detailed above in Point of Error Number Three, phrases such as "pubic area" and "genital area" cannot be sufficient evidence to support conviction under TEX.PENAL CODE § 22.021.

V. POINT OF ERROR NUMBER FIVE

A. The trial court committed reversible error when it denied Appellant's motion for an instructed verdict on Count Seven because there was insufficient evidence to support a conviction. (The complained of error can be found at S.O.F. Vol. 10 at 373.)

B. Argument and Authorities

Appellant incorporates by reference the argument and authorities section under Point of Error Number Three inasmuch as it relates to this Point of Error.

Count Seven charged the Appellant with sexual assault under TEX.PENAL CODE § 22.011. Like Counts Three and Four, Count Seven of the indictment alleges that the Appellant "cause[d] the sexual organ of [the complaining witness] . . . to contact the sexual organ of the defendant." (Tr. at 4.) The only difference between Count Seven and the previous two counts is that by the date the offense is alleged to have occurred, the complaining witness was over the age of 14 and

so the offense was sexual assault instead of aggravated sexual assault.

At trial, the following testimony regarding Count Seven was elicited on direct examination from the State's chief witness:

Q. After he pulled you on top of him, what part of his body touched your body?
A. His penis.
Q. Okay. And where did it touch you?
A. *Genital area*.

(S.O.F. Vol. 9 at 112, emphasis added.) This testimony was the only evidence offered to prove the essential element of Count Seven; i.e., that the Appellant had caused the witness's "sexual organ" to contact his own "sexual organ." As argued above in Point of Error Number Two, phrases such as "pubic area" and "genital area" cannot be sufficient evidence to support a conviction under TEX.PENAL CODE § 22.011.

VI. POINT OF ERROR NUMBER SIX

A. The trial court committed reversible error when it denied Appellant's motion for an instructed verdict on Count Seven because there was insufficient evidence to support a conviction. (The complained of error can be found at S.O.F. Vol. 10 at 373.)

B. Argument and Authorities

According to Count Seven of the indictment, the offense of sexual assault of a child under TEX.PENAL CODE §22.011 occurred on or about June 1, 1992. According to the only evidence offered to prove the offense, the testimony of the complaining witness, the offense occurred during the summer of 1992 after school was out. (S.O.F. Vol. 110-112.) The complaining witness was born on March 24, 1978, (S.O.F. Vol. 9 at 36), and so had attained her birth date for the year 1992 prior to school letting out for the summer. Therefore, the offense occurred when

the complaining witness was 14 years old.

Under the law that existed and was in effect at that time:

> A conviction under Chapter 21, Section 22.001, or Section 22.02, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense.

TEX.C.CRIM.PROC. Art. 38.07. The term "uncorroborated" was held to mean the absence of any eyewitness other than the victim. Heckathorne v. State, 697 S.W.2d 8, 12 (Tex.App. — Houston [14th Dist.] 1985, pet. ref'd); Shelby v. State, 800 S.W.2d 584, 586 (Tex.App. — Houston [14th Dist.] 1990), rev'd on other grounds, 819 S.W.2d 544 (Tex.Crim.App. 1991).

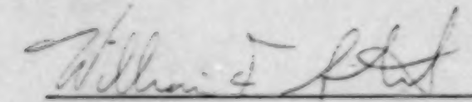
According to the Texas Court of Criminal Appeals, the purpose of the 1983 version of Art. 38.07 quoted above was to shield sexual assault victims under the age of 14, but to require stricter proof of offenses allegedly committed against victims age 14 and over. Scoggan v. State, 799 S.W.2d 679, 683 (Tex.Crim.App. 1990)(holding, in the case of a 15 year old victim, that "[s]ince corroboration or outcry requirements were not met in this case, the evidence is insufficient to support appellant's conviction.")

In the case at bar there was no outcry by the complaining witness until years after the offense charged in Count Seven. Nor is there any corroborating evidence. Therefore, under the law in effect at the time of the offense, the conviction must be reversed and the Appellant acquitted of that charge. (Id.)

PRAYER

In light of the foregoing facts and arguments, Appellant respectfully prays that this Court set aside the judgement of the District Court and reverse these convictions and remand for a new trial; or, in the alternative, reverse the convictions on Counts One, Three, Four, and/or Seven and remand for a new trial.

Respectfully submitted,



William F. Street
State Bar Number 00791742
P.O. Box 917
Denton, Texas 76202
(940) 891-1985
FAX: (940) 891-1974

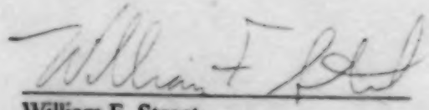
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, William F. Street, hereby certify that a true and correct copy of the above and foregoing Appellant's Brief was mailed, via U.S. Mail, postage pre-paid, or hand delivered, to the following persons, in accordance with Tex. R. App. P. 202(e) on this 28th day of August, 1997.

(1) Scott Leslie Carmell
TDC # 777548, Allred Unit
2101 F.M. 369 N.
Iowa Park, Texas 76367

(2) Denton County Criminal District Attorney's Office
401 West Hickory Street
J. Carroll Courts Building
Denton, Texas 76201
counsel for Appellee



William F. Street

APPENDIX B

STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests that this matter be set for oral argument and that counsel be appointed for purposes of that hearing. Oral argument is necessary to resolve, explain or expand on any issue of which this Court may be unresolved and to affirm the petitioner's position on both the law and the facts.

TABLE OF CONTENTS

IN THE

COURT OF CRIMINAL APPEALS

AT AUSTIN, TEXAS

No. _____

SCOTT LESLIE CARMELL,

Petitioner-Appellant,

V.

THE STATE OF TEXAS,

Respondent-Appellee.

APPELLANT'S PRO SE PETITION FOR DISCRETIONARY REVIEW

On Petition For Discretionary Review From The
Second Court of Appeals in Cause No. 02-97-197-CR

TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW Scott Leslie Carmell, pro se appellant and, pursuant to Rule 68, Texas Rules of Appellate Procedure, petitions this Court to exercise its discretion and review the opinion of the Second Court of Appeals dated February 12, 1998. In support, petitioner would show the following:

III.

QUESTIONS PRESENTED FOR REVIEW

(1)

Did the court of appeals err in concluding that application of the 1993 version of article 38.07, V.A.C.C.P., was not an ex post facto violation when: (i) the offense occurred in 1992; (ii) there was no outcry for approximately three years; and, (iii) petitioner would have otherwise been entitled to an acquittal?

(2)

Did the court of appeals err in concluding that Rule 608(b) of the Rules of Criminal Evidence was dispositive of the prosecutor's intentionally withholding evidence favorable to the accused?

(3)

Did the court of appeals err in concluding that testimony of "genital area" and "pubic hair" were legally sufficient to support the convictions, when the terms are not interchangeable and do not include the female sexual organ as defined by statute?

IV.

REASONS FOR REVIEW

Ground For Review No. 1 - Restated

The court of appeals erred in concluding that application of the 1993 version of article 38.07, V.A.C.C.P., was not an ex post facto violation when: (i) the offense occurred in 1992; (ii) there was no outcry for approximately three years; and, (iii) petitioner would have otherwise been entitled to an acquittal.

Arguments and Authorities

The court of appeals decided an important question of state and federal law that has not been but should be decided by this Court, and which is in conflict with decisions of other courts of appeals on the same issue. That is, the court of appeals has misconstrued a statute to the accused's disadvantage, i.e., whether the 1993 version of article 38.07 C.C.P. is an ex post facto violation as applied to the facts of this case.

committed against victims age 14 years and over. Id., at 683 (corroboration of outcry requirements were not met and the evidence was insufficient to support the conviction). Other courts of appeals have entered acquittals in similar situations as what petitioner now faces. See Friedel v. State, 832 S.W.2d 420 (Tex.App.-Austin 1992); Jones v. State, 789 S.W.2d 330 (Tex.App.-Houston [14th Dist.] 1990); Hill v. State, 658 S.W.2d 705 (Tex.App.-Dallas 1983) (reversed on other grounds). See also Bowers v. State, 914 S.W.2d 213, 217 (Tex.App.-El Paso 1996).

In this case, application of the newer version of article 38.07 is unconstitutional and constitutes an ex post facto application for the reason that it changes the legal rules of evidence and requires less proof to convict from the law in effect at the time of the offense, Lindsey v. State, 672 S.W.2d 892, 894 (Tex.App.-Dallas 1984), it deprives petitioner of an affirmative defense available at the time when the act was committed, see Bowers v. State, 914 S.W.2d 213, 217 (Tex.App.-El Paso 1996); Collins v. Youngblood, 110 S.Ct. 2715 (1990); Ex Parte Hallmark, 883 S.W.2d 672 (Tex.Cr.App. 1994) and Grimes v. State, 807 S.W.2d 582 (Tex.Cr.App. 1991), and, finally, it deprives petitioner of an acquittal that he would otherwise have been entitled to. Bowers, Friedle, Hill and Jones, all supra.

Hence, review be granted in this case and petitioner is entitled to an acquittal under the law in effect at the time of the commission of the offense.

This case is distinguished from Ramos because the evidence excluded in Ramos was of sexual exploits of the complaining witness and her mother after the defendant step-father had left the family, and was offered solely for attacking the character of the complainant and her mother. Id., 819 S.W.2d at 942. In the instant case, however, the evidence of an extramarital affair before separation, which clearly indicates bias on the part of the mother, and is offered only to show bias against the accused is admissible into evidence for the jury's informed deliberation.

Evidence of a witnesses' bias is critical to the fairness and proper functioning of the adversarial process. Juries cannot weigh evidence and testimony without full knowledge of the witnesses' motivations. Motives which operate in a witnesses' mind should never be regarded as immaterial or irrelevant. Steve v. State, 614 S.W.2d 137, 140 (Tex.Cr.App. 1961), favorably citing McDonald v. State, 77 Tex.Cr.Rep. 612, 179 S.W. 80 (1915). Great and fair latitude should be allowed the accused to show animosity, bias, or motive on part of the witness testifying against the accused. The jury should not be deprived of the fair chance to weigh that witnesses' credibility by failure to explore that bias, motive or animosity. Steve, 614 S.W.2d at 140. In this case, no greater tool exists for the mother than use of the courts to get what she wants. In one sweep she takes home, finances, car, property and children, and rids herself of the husband while enjoying her affair and having another man's baby, while at the same time she and the daughter bring serious felony charges against the husband.

and motive and should therefore have been admitted for the jury's deliberation. The conviction should therefore be reversed and this cause remanded to the trial court for further proceedings.

(3)

Ground For Relief No. 3 - Restated

The court of appeals erred in concluding that testimony of "genital area" and "pubic hair" were legally sufficient to support the convictions, when the terms are not interchangeable and do not include the female sexual organ as defined by statute.

Arguments and Authorities

The court of appeals has decided an important question of law in a way that conflicts with this Court's previous decisions on the same issue, and that of other courts of appeals, in declaring that "pubic hair" and "genital area" constitute parts of the "female sexual organ" for purposes of Sections 22.011 and 22.021.

The question presented here is whether the court of appeals erred in equating "genital area" and "pubic hair" with "genitals" and the "female sexual organ." Female sexual organs have been defined in opinion as the vulva, the vagina and vaginal canal, the uterus, mons pubis and the labia, but has never been defined by statute or opinion as "the pubic hair" or the "genital area." The terms "genital area," "pubic hair," and "female sexual organ" simply are not synonymous in opinion or statute. The term genital area includes much more than just the genitals or the female sexual organ. The term genital area is not sufficient to prove genitals per se. As a matter of logic as well as linguistics, "genital area" must mean the area around and including the genitals. This area, then, includes the female

the offense. The terms "genital area," "pubic area," and "pubic hair" simply are not legally sufficient to sustain the conviction and are too vague and poorly defined to sustain a conviction in a case where the statute requires proof of contact with the "female sexual organ." Had the indictment alleged merely "pubic area," "pubic hair," or genital area," it would have been subject to a motion to quash for failure to track the necessary statutory language and failure to put the accused on notice to any criminal offense.

The statutes require proof of contact with "the female sexual organ," and not "in the area of the female sexual organ." The court of appeals held that the upper thigh and lower abdomen are parts of the sexual organ because they are in the area of the sexual organ, resulting in unwarranted legislation from the bench making it a criminal offense to touch one in the area of the thigh or abdomen, despite the legislature never doing so.

The complainant testified that the petitioner touched her "pubic hair" during a back rub. Appellant's Brief, at page 6, citing the record at SOF IX, p. 80. Petitioner can find no Texas legal authority that the term "genitals" includes "pubic hair."

This Court, examining the very statute at issue here, held that the word "genitals" includes the vulva and surrounding area of the vagina itself. Clark v. State, 558 S.W.2d 887 (Tex.Cr.App. 1977). However, as indicated ,the State's witness did not testify that the petitioner touched her vagina or her genitals. She testified only that petitioner touched her "pubic hair." It is unlikely that the legislature contemplated "pubic

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a true and correct copy of the forgoing APPELLANT'S PRO SE PETITION FOR DISCRETIONARY REVIEW on opposing counsel by mailing same, via U.S. Mail, first-class postage prepaid, properly enveloped and deposited in the prison institution's internal mailbox for outside mailing on this 18 day of May, 1998, addressed to: State Prosecuting Attorney, P.O. Box 12405, Austin, TX 7871' (Rule 68.11, TRAP) and to the Denton County Criminal District Attorney's Office, 401 W. Hickory Street, J. Carroll Courts Bldg., Denton, Texas 76201.

Scott Leslie Carmell 777548
Scott Leslie Carmell #777548
Petitioner-Appellant, Pro Se

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-97-197-CR

SCOTT LESLIE CARMELL — APPELLANT

VS.

THE STATE OF TEXAS — STATE

FROM THE 367TH DISTRICT COURT OF DENTON COUNTY

OPINION

I. INTRODUCTION

Appellant Scott Leslie Carmell was convicted of eight counts of indecency with a child, two counts of aggravated sexual assault, and five counts of sexual assault against his stepdaughter K.M. The jury assessed punishment at life on the aggravated sexual assault counts and 20 years on the remaining counts. In six points, appellant argues that (1) the trial court erred in denying his motion for new trial because the State did not disclose impeachment evidence and (2) would tell K.M. to take her shirt off and pull her shorts down a little. In the spring of 1991, appellant touched her "on the pubic hair" during one of the back rubs. Appellant then decided that he and K.M. needed to "date" and spend every Tuesday night together. This included sleeping in the same bed. Appellant claimed that this was part of the family's bonding process.

In the summer of 1991, appellant took his clothes off, got in a sleeping bag with K.M., and pulled her on top of him. He put his erect penis between her legs, and his penis touched her "genital area." Later that summer, appellant and K.M. were sleeping together nude when appellant pulled K.M. on top of him. He put his erect penis between her legs and pushed against her "pubic" or "genital" area. In June 1992, appellant took K.M. into his bedroom for a "nap." They undressed, and appellant pulled her on top of his erect penis, touching her "genital area."

These incidents and more finally led to appellant having sex with K.M. in September 1993. Two days later, appellant "married" K.M. in a mock ceremony and continued having sex with her until early 1995.[2] K.M. finally told her mother about the long-term abuse, and her mother took her to the police. At trial, Eleanor testified that once while she visited appellant in jail, he wrote

---

[2]Appellant was a devoted correspondent and would send letters and card to K.M., signing them "Dad, friend, and partner for life." [IX RR 165]

may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *See Matson*, 819 S.W.2d at 846.

C. June 1992 Sexual Assault

1. Timing of the outcry

In his sixth point, appellant argues that he should be acquitted of one of the sexual assault convictions because K.M. did not tell her mother about the abuse until "years after the offense" and there was nothing to corroborate K.M.'s version of events.

Appellant bases his argument on the version of article 38.07 that was in effect in June 1992, the date of the charged offense of sexual assault:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense. The court shall instruct the jury that the time which lapsed between the alleged offense and the time it was reported shall be considered by the jury only for the purpose of assessing the weight to be given to the testimony of the victim.[3]

[3]Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91 & Act of May 29, 1983, 68th Leg., R.S., ch. 977, § 7, 1983 Tex. Gen. Laws 5317, 5319.

Accordingly, because K.M. was younger than 18 at the time of the offense, the one-year time limit on her outcry does not apply. We overrule appellant's sixth point.[5]

2. Sexual organ contact

In his fifth point, appellant claims that the evidence was legally insufficient to support the sexual assault conviction because K.M.'s testimony that appellant touched her "genital area" with his penis is not specific enough to prove that his penis contacted K.M.'s sexual organ in June 1992. Appellant concedes that if K.M. had testified that appellant's penis touched her "genitals" or "genitalia," the evidence would be sufficient. *See Aylor v. State*, 727 S.W.2d 727, 729-30 (Tex. App.—Austin 1987, pet. ref'd) (citing *Clark v. State*, 558 S.W.2d 887, 889 (Tex. Crim. App. 1977)).

Sexual assault is proven when the State shows that the defendant "intentionally or knowingly cause[d] the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor." TEX. PENAL CODE ANN. § 22.011(a)(2)(C) (Vernon Supp. 1998). "'[G]enitals' includes the vulva which immediately surrounds the vagina." *Clark*,

[5]In three supplemental points, appellant asserts that this argument also applies to three of the indecency with a child counts, which occurred in March, June, and July of 1993. Because we have held that the 1993 version of the statute applied to appellant, we overrule supplemental points seven, eight, and nine.

Indecency with a child requires "sexual contact" between the victim and the defendant. TEX. PENAL CODE ANN. § 21.11 (Vernon 1994). Sexual contact is defined as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." *Id.* § 21.01(2). The external genital organs include the mons pubis, which is "the rounded eminence in front of the pubic symphysis [that] is formed by a collection of fatty tissue beneath the integument. It becomes covered with hair at the time of puberty." CHARLES M. GOSS, GRAY'S ANATOMY 1405 (26th ed. 1954). Thus, by touching K.M.'s pubic hair, appellant touched a part of her genitals. The evidence was legally sufficient and we overrule appellant's second point.

III. FAILURE TO REVEAL IMPEACHMENT EVIDENCE

In his first point, appellant argues that the trial court should have granted him a new trial because the State failed to disclose that Eleanor had another man's child while appellant was in prison. The State does not dispute that it did not disclose this evidence to appellant.

We review the denial of a motion for new trial based on newly-discovered evidence under an abuse of discretion standard. *See Driggers v. State*, 940 S.W.2d 699, 709 (Tex. App.—Texarkana 1996, pet. ref'd) (op. on reh'g). The State must produce exculpatory as well as impeachment evidence to a

IV. CONCLUSION

Because we find that the evidence was legally sufficient and the trial court did not abuse its discretion in denying appellant's motion for new trial, we affirm the trial court's judgments.[6]

PER CURIAM

PANEL F: HOLMAN, J.; CAYCE, C.J.; and DAY, J.

PUBLISH

FEB 12 1998

---

[6]Appellant has filed a letter asking us to reprimand or replace his court-appointed attorney. His only complaint with counsel is that counsel is not communicating with him. Unless an appellant waives counsel and chooses to represent himself or shows an adequate reason for new counsel, appellant must accept the counsel appointed by the court. *See Halliburton v. State*, 928 S.W.2d 650, 651-52 (Tex. App.—San Antonio 1996, pet. ref'd); *see also Hubbard v. State*, 739 S.W.2d 341, 344 (Tex. Crim. App. 1987). Appellant has done neither, and we deny his requests.

OFFICE OF THE ATTORNEY GENERAL STATE OF TEXAS
JOHN CORNYN

April 23, 1999

Honorable William K. Suter, Clerk
United States Supreme Court
Office of the Clerk
1 First St., N.E.
Washington, D.C. 20543

Re: *Scott Leslie Carmell v. The State of Texas*
No. 98-7540

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine (9) copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

By copy of this letter, I am forwarding a copy of this brief to Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

CHARLES A. PALMER
Assistant Attorney General
(512) 936-1400

CAP:cc
Enclosure
c: Scott Leslie Carmell
TDCJ No. 777548
Beto I Unit
P.O. Box 128
Tennessee Colony, Texas 75880

No. 98-7540 (4)

In The United States Supreme Court
October Term, 1998

Scott Leslie Carmell, Petitioner

v.

State of Texas, Respondent

On Petition For Writ of Certiorari
To The Court of Appeals for the Second District
of Texas

Petitioner's First Reply Brief to Respondent's Brief In Opposition

To The Honorable Justices Of The Supreme Court:

Now Comes Scott Carmell, Petitioner Prose, and files this First Reply Brief to Respondent's Brief in Opposition.

Reasons For Granting The Writ

I. The Questions Presented For Review Are Worthy Of The Court's Attention.

Petitioner, Scott Carmell, presented to this Court important issues of law in his Petition For Writ Of Certiorari. These unresolved issue, and questions resulting therefrom, have merit so as to warrant the Court's exercise of its certiorari jurisdiction.

11 pp

II. Does The Application Of The Amended Version Of Article 38.07 of The Texas Code Of Criminal Procedure To An Alleged Offense Dated Prior To The Amendment Violate The Ex Post Facto Clause?

Article 1, Section 10 of the U.S. Constitution forbids the states from passing ex post facto laws. The amended application of Tx CCP §38.07 to the conviction in question goes beyond merely adversely affecting the Petitioner as the state incorrectly said. The law in effect at the time of the alleged offense would have resulted in acquittal had it been applied at the time of trial. However, the state used an amended version which stripped Mr. Carmell from an acquittal.

The state asked this Court to deny the Petition For Writ of Certiorari on this issue while incorrectly saying no deprivation of an affirmative defense occurred. However, "Every law that alters legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender" is an Ex Post Facto violation. (Collins v. Youngblood, 110 S.Ct. 2715 (1990) at 2719; quoting Calder v. Bull, 3 Dall. 386, 390-392, 1 L.Ed. 648 (1798)). This has never been denied by this Court.

Procedural changes, as in Tx C.C.P. §38.07, may constitute an Ex Post Facto Clause violation if it affects matters of substance by depriving a defendant of substantial protections with which the existing law surrounds the person accused of a crime. (Id. 2720) The change in §38.07 not only affected procedure but also changed evidence required

for a conviction — requiring less than at the time of the alleged offense. This clearly violates ex post facto.

Texas Code of Criminal Procedure, Article 12 (Limitations) limits the state to prosecuting a defendant to a certain statutory procedural time period. The state is barred from prosecution beyond that time period. One charged with a crime after the limitation period can use Tx CCP article 12 as an affirmative defense to prosecution and prevent conviction.

Likewise, article 38.07 limited the alleged victim in this case to a statutory limitation period of six months for making an outcry which was required for uncorroborated testimony leading to a conviction. Acquittal was mandatory under the law at the time of the alleged offense since there was no outcry within that time period and the testimony was uncorroborated. Just as Tx.C.C.P. article 12 bars conviction so does the previous version of §38.07 after a statutorily designated time period. Changing either one and applying it retroactively after the time period expired is clearly an Ex Post Facto Clause violation.

Additionally, the effective date of the amended version of §38.07 used at trial was September 1, 1993. This was applied to a June 1, 1992 offense date. However, the legislature did not authorize a retroactive application to alleged offenses prior to September 1, 1993. Such authorization would have been an expost facto violation — which was never intended by the legislature.

Ex Post Facto applies to some procedural changes if it deprives a defendant of a defense. (Id. 2725-2726) In this case the retroactive application of the 1993 §38.07 version involved a change from acquittal to a twenty-year sentence. What would have been conclusive

statutory evi ce mandating acquittal u . the alleged offense was committed was not received as evidence under the new law. The retroactive application of the amended 38.07 materially impaired Mr. Carmell's right to have the question of his guilt/innocence determined according to the law as it was when the alleged offense occurred (Id. 2718)

Ex Post Facto was intended to secure substantial personal rights against oppressive legislation. (Id. 2717) To strip an accused of a procedural bar to conviction (ie. expiration of limitations, expiration of outcry) that existed at the time of the alleged offense is oppressive and an Ex Post Facto violation. Thus, a procedural protection is substantial when viewed from the commission of the offense, if it affects the modes of procedure by which a valid conviction or sentence may be imposed. (Id 2721)

The Petitioner, Mr. Carmell, was not afforded all the procedural and substantive protections guaranteed by Texas law and the U.S. Constitution, Amendment XIV, at the time of the offense due to infecting the jury with new procedures not yet devised at the time of the alleged offense. In addition, the Texas Second Court of Appeals ruled against Mr. Carmell contrary to the decision of another court that entered acquittals in similar situations. (Bowers v. State, 914 SW 2d 213, 217 (Tex. App. - El Paso 1996)) Therefore, the exercise of this Court's jurisdiction is needed to resolve the Texas court's conflict and secure Mr. Carmell's U.S. Constitutional Protections.

III. Are The Petitioner's Sixth and Fourteenth Amendment Claims Properly Before The Court?

The Petitioner's Constitutional right of confrontation (U.S.C., Amend. 6) was violated by the prosecutor intentionally withholding evidence that was favorable to the accused.

This claim was properly presented to the court below.

This issue is not being raised for the first on a Petition For Writ of Certiorari as the state claimed. To set the record straight, Mr. Carmell's attorney of record, William Street, presented to the state court of appeals the prosecutor's failure to disclose material impeachment evidence. This was presented as a violation of the Fourteenth Amendment Due Process Clause. This Due Process Clause violation was then further defined by Mr. Carmell, pro se litigant, to more specifically expose the violation of his right to confrontation. It was impossible to confront what was withheld in violation of the Fourteenth Amendment.

Beyond that, the state falsely claims "... Carmell's Petition For Writ of Certiorari is silent as to ... the Due Process Clause ..." (Response brief, p. 10) However, page 7 of the Petition clearly refers to the Fourteenth Amendment. Thus, the Fourteenth Amendment due process violation presented to the lower court is presented here.

The prosecutor knew the state's case would be weakened, if not destroyed, by providing the defense team impeaching evidence. Therefore, the prosecutor saw fit to lie more than once, until it was too late to present the facts to the jury, in violation of Mr. Carmell's Constitutional protections.

The state alleged Eleanor's baby was conceived after the Petitioner's arrest. No proof was presented to support this. Also, the state skirted Eleanor's bias, motive, & lack of honesty and integrity. Why? Because credibility and honesty of the witness and the state are in question. Therefore, there is a reasonable probability that presenting these matters to a jury would result in a different outcome.

The state also alleged this issue has not reached

state exhaustion. However, this issue was presented to the Texas Court of Criminal Appeals in the Petition For Discretionary Review (PDR). The refusal of the Texas Court of Criminal Appeals to rule on the PDR is not a ruling on the merits of the case. In addition, the lower courts refusal to hear the PDR is not a "procedural bar" to this Court's jurisdiction. In refusing to rule on the merits of the PDR, when given the opportunity, the state court waived "exhaustion."

The Petition For Writ of Certiorari, a continuation of the argument before the Texas court of appeals, that received no ruling on merits by the Texas Court of Criminal Appeals, presents both Sixth and Fourteenth Amendment violations to this Court. Therefore, the review powers of this Court are called upon to protect Mr. Carmell's Constitutional rights.

The state wished to confuse the issue. However, the simple issue is as follows: The prosecutor withheld evidence favorable to the accused in violation of the Due Process Clause of the Fourteenth Amendment resulting in c. violation of the Petitioner's confrontation rights under the Sixth Amendment. Therefore, this Court is asked to exercise its jurisdiction in this matter.

IV. Is An Insufficiency Claim In Violation of The Fifth and Fourteenth Amendments Worthy Of Certiorari Review?

A claim of insufficiency, raised in the lower court previously, is a Federal Constitutional claim — as the state concedes. In this case, the state misconstrued evidence to include things beyond the bounds of state

law.

The Petitioner does not have to prove he did not engage in the conduct in question as the state asserted to confuse the issue. (Respondent's brief, p. 14) The matter at hand currently is whether the state impermissibly expanded statutory law.

The statute in question (Tex.P.C. 22.021) specifies contact with the "genitals" — not the "area" or "hair." "Genital area" and "pubic hair" simply are not equivalent to "genital."

If "area" and "hair" were synonomous with "genital" an indictment could read: "Caused contact with the genital area (or pubic hair)." However, if Petitioner had been so indicted the indictment would have been quashed for failure to track statutory language. Such an indictment would be creating a new crime not authorized by the legislature. Yet, the lower court did exactly that in their ruling. This is nothing less than creating a new offense for an alleged antecedant event.

A person combs or brushes his hair — not his head. The hair even grows on the neck. "Hair" and "head" are two different things. Likewise, "pubic hair" — which grows above the pubic bone, inside the thighs, etc. — and "genital" are two different things.

Beyond that, many people live in the Washington, D.C. "area" but reside outside of Washington, D.C. — some many miles out. Similarly, the "genital area" lies outside and around the "genitals." Therefore, a massage

therapist or doctor could work on a client/patient in the "genital area" and never have genital contact. Also, a female may shave in the "genital area" — inner thighs, lower abdomen and pubic bone — before putting on a bathing suit and stay clear of her genitals.

Since "genital area" and "pubic hair" involve anatomy other than the genitals, the alleged victim's testimony went outside the bounds of state law and was therefore insufficient.

The state attempted to minimize this matter by stating the Federal Circuit Court does "not police every minutiae in state criminal procedural activity. (Respondent's brief, p.14) However, insufficiency of evidence goes beyond mere "minutiae (of) procedural activity" to the very substance of a conviction. Therefore, a meaningful Federal Court claim is presented to this Court for its review to ensure Mr. Carmell of his Constitutional protections under the Fifth and Fourteenth Amendments.

Conclusion

Due to insufficiency of evidence, violations of the Fifth, Sixth and Fourteenth Amendment protections, and violation of U.S.C. art. 1, sec. 10 Ex Post Facto Clause, the conviction should be reversed.

Prayer

The Petitioner respectfully prays this Court to grant this Petition For Writ Of Certiorari.

Respectfully submitted,

Scott Leslie Carmell,
Pro se
Date: May 14, 1999

Scott Leslie Carmell
777548- Beto I
P.O. Box 128
Tennessee Colony, Texas
75880

No. 98-7540

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1998

Scott Leslie Carmell, Petitioner
v.
State of Texas, Respondent

On Petition for Writ of Certiorari
To the Court of Appeals for the
Second District of Texas

PROOF OF SERVICE

I hereby certify that on the 14th day of May, 1999, one copy of Petitioner's First Reply Brief to Respondent's Brief In Opposition was mailed, postage paid to Charles A. Palmer, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711. All parties required to be served have been served.

Scott L. Carmell
Pro se
Scott L. Carmell
777548 - Beto I
P.O. Box 128
Tennessee Colony, Texas 75880

May 14, 1999

Honorable William K. Sutter, Clerk
United States Supreme Court
1 First Street N.E.
Washington, D.C. 20543-0001

Re: Scott Leslie Carmell v State of Texas
No. 98-7540

Dear Mr. Sutter:

Enclosed for filing is the Petetioner's First Reply Brief. Also enclosed is the Proof of Service form.

Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed self-addressed stamped envelope.

Opposing counsel has been served.

Thank you for your assistance.

Sincerely,
Scott L. Carmell
Scott L. Carmell
777548 - Beto I
P.O. Box 128
Tennessee Colony, Tx 75880

No. 98-7450

In The

Supreme Court of the United States

SCOTT LESLIE CARMELL,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Appeals

JOINT APPENDIX

GREGORY S. COLEMAN*
Solicitor General
Office of the
Attorney General
State of Texas
P.O. Box 12548,
Capitol Station
Austin, TX 78711
(512) 936-1894

Counsel for Respondent

RICHARD D. BERNSTEIN*
CARTER G. PHILLIPS
KATHERINE L. ADAMS
PAUL A. HEMMERSBAUGH
BRIAN C. KALT
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

**Counsel of Record*

September 17, 1999

Petition For Writ Of Certiorari Filed December 14, 1998
Certiorari Granted June 14, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

[TRAIL COURT] DOCKET SHEET

12/30/96 PRETRIAL HEARING-STATE, DEFT & DEFT'S ATTY PRESENT, CT. CONSIDERED DEFTS MOTION TO QUASH AND CT. DENIED MOTION TO QUASH; DEFT (PROSE) ADDRESSED CT. BUT DID NOT UNEQUVOCALLY [sic] WAIVE RT. TO COUNSEL. LG

1/6/97 CASE SET FOR JURY TRIAL-STATE, DEFT & DEFT'S ATTY APPEARED-BEFORE JURY SELECTION CT. ASKED DEFT IF HE WISHED TO PURSUE HIS MOTION TO DISCHARGE ATTY & FOR APPT. OF NEW ATTY-DEFT. SAID HE NO LONGER WANTED A DIFFERENT CT. APPTED ATTY, BUT WAS CONSIDERING REP. HIMSELF, DEFT. STATE FOR RECORD HE WANTED MR. PAINE TO REP. HIM, CT. DENIED DEFT'S PRO SE APP. FOR WRIT OF HABEAS CORPUS. JURY PANEL SWORN & SEATED, VOIR DIRE WAS CONDUCTED & JURY WAS SELECTED & SWORN. LG

1/7/97 DEFT. ARRAIGNED OUTSIDE PRESENCE OF JURY & DEFT. PLED "NOT GUILTY" TO ALL 15 COUNTS INDICTMENT READ BEFORE JURY & DEFT. PLED "NOT GUILTY" TO ALL 15 COUNTS: OPENING STMTS. PRESENTED & EVIDENCE BEGUN. LG

1/8/97 EVIDENCE CONT'D. STATE RESTED: DEFT RESTED: BOTH SIDES CLOSED: JURY CHARGE PREPARED: DEFT. MADE MOT. FOR DIRECTED VERDICT ON COUNTS I-IV: CT. DENIED MOTION. LG

1/9/97 CHARGE READ TO JURY: FINAL ARGUMENTS PRESENTED: JURY RETIRED TO DELIBERATE: JURY RETURNED VERDICT OF "GUILTY" AS TO ALL 15 COUNTS: CT. ACCEPTED VERDICT: PUNISHMENT PHASE BEGUN: STATE PRESENTED EVIDENCE. LG

1/10/97 EVID. CONT'D IN PUN. PHASE: STATE RESTED: DEFT. PRESENTED EVID. ON PUNISHMENT: DEFT. RESTED: BOTH SIDES CLOSED: CHARGE PREPARED & READ TO JURY: ARGUMENTS PRESENTED ON PUNISHMENT: JURY RETIRED TO DELIBERATE: JURY RETURNED VERDICT OF 20 YRS ID-TDCJ ON 13 COUNTS AND "LIFE" ON TWO COUNTS-CT. ACCEPTED VERDICT OF JURY & DISCHARGED JURY: SENTENCING SET FOR 1/14/97 @8:45 AM. LG

1/14/97 STATE, DEFT & DEFT'S ATTY APPEARED FOR SENTENCING-DEFT. FORMALLY SENTENCED & ADVISED OF RT. TO APPEAL. LG

3/24/97 CT. DENIED DEFT'S MOTION FOR NEW TRIAL. LG

Scott Leslie CARMELL, Appellant,

v.

The STATE of Texas, State.

No. 2-97-197-CR.

Court of Appeals of Texas,
Fort Worth.

Feb. 12, 1998.

Rehearing Overruled March 26, 1998.

William F. Street, Denton, for Appellant.

Bruce Isaacks, Criminal District Attorney, Yolanda M. Joosten, Paige McCormick, Earl Dobson, Assistant District Attorneys, Denton, Matthew Paul, State Prosecuting Attorney, Austin, for Appellee.

Before HOLMAN, J., CAYCE, C.J., and DAY, J.

OPINION

PER CURIAM.

I. Introduction

Appellant Scott Leslie Carmell was convicted of eight counts of indecency with a child, two counts of aggravated sexual assault, and five counts of sexual assault against his stepdaughter K.M. The jury assessed punishment at life on the aggravated sexual assault counts and 20 years on the remaining counts. In six points, appellant argues that (1) the trial court erred in denying his motion

for new trial because the State did not disclose impeachment evidence and (2) the evidence was legally insufficient to support the aggravated sexual assault convictions, one of the indecency convictions, and one of the sexual assault convictions. Because we find that the impeachment evidence would not have been admissible and that the evidence was legally sufficient, we affirm the convictions.

II. Legal Sufficiency of the Evidence

In five points, appellant challenges the legal sufficiency of the evidence regarding four of the convictions.[1] We will try to limit the recitation of the facts to these four counts as much as possible due to the disturbing and graphic nature of this case.

A. Factual Background

Ron Borchert and Eleanor Alexander married in 1972. K.M. was born on March 24, 1978. Eleanor began to see appellant, a counselor specializing in counseling victims of incest, because she was an incest survivor. In early 1987, Eleanor divorced Ron and married appellant the next year.

By the time K.M. was twelve, appellant would give her a back rub every night after she said her prayers.

[1] Although appellant challenges the denial of his motions for an instructed verdict, the points actually attack the legal sufficiency of the evidence. *See Madden v. State*, 799 S.W.2d 683, 686 (Tex.Crim.App.1990), *cert. denied*, 499 U.S. 954, 111 S.Ct. 1432, 113 L.Ed.2d 483 (1991).

Soon the back rubs changed, and appellant would tell K.M. to take her shirt off and pull her shorts down a little. In the spring of 1991, appellant touched her "on the pubic hair" during one of the back rubs. Appellant then decided that he and K.M. needed to "date" and spend every Tuesday night together. This included sleeping in the same bed. Appellant claimed that this was part of the family's bonding process.

In the summer of 1991, appellant took his clothes off, got in a sleeping bag with K.M., and pulled her on top of him. He put his erect penis between her legs, and his penis touched her "genital area." Later that summer, appellant and K.M. were sleeping together nude when appellant pulled K.M. on top of him. He put his erect penis between her legs and pushed against her "pubic" or "genital" area. In June 1992, appellant took K.M. into his bedroom for a "nap." They undressed, and appellant pulled her on top of his erect penis, touching her "genital area."

These incidents and more finally led to appellant having sex with K.M. in September 1993. Two days later, appellant "married" K.M. in a mock ceremony and continued having sex with her until early 1995.[2] K.M. finally told her mother about the long-term abuse, and her mother took her to the police. At trial, Eleanor testified that once while she visited appellant in jail, he wrote "adultery with [K.M.]" on a piece of paper when she told

[2] Appellant was a devoted correspondent and would send letters and cards to K.M., signing them "Dad, friend, and partner for life." [IX RR 165]

him that he needed to confess if he was sorry for what he had done to K.M.

B. Standard of Review

In reviewing the legal sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the jury's verdict. *See Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex.Crim.App.1992), *cert. denied*, 507 U.S. 975, 113 S.Ct. 1422, 122 L.Ed.2d 791 (1993). The critical inquiry is whether, after so viewing the evidence, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Emery v. State*, 881 S.W.2d 702, 705 (Tex.Crim.App.1994), *cert. denied*, 513 U.S. 1192, 115 S.Ct. 1257, 131 L.Ed.2d 137 (1995). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979).

The legal sufficiency of the evidence is a question of law. The issue on appeal is not whether we as a court believe the State's evidence or believe that the defense's evidence outweighs the State's evidence. *See Matson v. State*, 819 S.W.2d 839, 846 (Tex.Crim.App.1991); *Wicker v. State*, 667 S.W.2d 137, 143 (Tex.Crim.App.), *cert. denied*, 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *See Matson*, 819 S.W.2d at 846.

C. June 1992 Sexual Assault

1. Timing of the outcry

In his sixth point, appellant argues that he should be acquitted of one of the sexual assault convictions because K.M. did not tell her mother about the abuse until "years after the offense" and there was nothing to corroborate K.M.'s version of events.

Appellant bases his argument on the version of article 38.07 that was in effect in June 1992, the date of the charged offense of sexual assault:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense. The court shall instruct the jury that the time which lapsed between the alleged offense and the time it was reported shall be considered by the jury only for the purpose of assessing the weight to be given to the testimony of the victim.[3]

This statute was amended in 1993 to provide that the outcry had to occur within one year after the offense only

---

[3] Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91 & Act of May 29, 1983, 68th Leg., R.S., ch. 977, § 7, 1983 Tex. Gen. Laws 5317, 5319.

if the victim was 18 or older and delete the jury instruction requirement.[4] Appellant posits that because K.M. was 14 at the time of the June 1992 sexual assault, K.M. was required to tell her mother within six months under the law in effect at the time of the offense; thus, because there was no outcry for about three years, the evidence was legally insufficient.

The statute as amended does not increase the punishment nor change the elements of the offense that the State must prove. It merely "removes existing restrictions upon the competency of certain classes of persons as witnesses" and is, thus, a rule of procedure. *Hopt v. Utah*, 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed. 262, 269 (1884). Further, there is no showing that the legislature intended that article 38.07 not be a rule of procedure and apply as of the date of the offense. *See generally Lindquist v. State*, 922 S.W.2d 223, 227 n. 4 (Tex.App. – Austin 1996, pet. ref'd). As a rule of procedure, it applies to pending and future prosecutions. *See Zimmerman v. State*, 750 S.W.2d 194, 202-04 (Tex.Crim.App.1988). Thus, the law in effect at the time of appellant's trial in 1997 applies, which is the version amended in 1993.

Accordingly, because K.M. was younger than 18 at the time of the offense, the one-year time limit on her outcry does not apply. We overrule appellant's sixth point.[5]

---

[4] *See* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (currently at TEX.CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp.1998)).

[5] In three supplemental points, appellant asserts that this argument also applies to three of the indecency with a child counts, which occurred in March, June, and July of 1993. Because we have held that the 1993 version of the statute applied to appellant, we overrule supplemental points seven, eight, and nine.

2. Sexual organ contact

In his fifth point, appellant claims that the evidence was legally insufficient to support the sexual assault conviction because K.M.'s testimony that appellant touched her "genital area" with his penis is not specific enough to prove that his penis contacted K.M.'s sexual organ in June 1992. Appellant concedes that if K.M. had testified that appellant's penis touched her "genitals" or "genitalia," the evidence would be sufficient. *See Aylor v. State*, 727 S.W.2d 727, 729-30 (Tex.App. – Austin 1987, pet. ref'd) (citing *Clark v. State*, 558 S.W.2d 887, 889 (Tex.Crim.App.1977)).

Sexual assault is proven when the State shows that the defendant "intentionally or knowingly cause[d] the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor." TEX. PENAL CODE ANN. § 22.011(a)(2)(C) (Vernon Supp.1998). " '[G]enitals' includes the vulva which immediately surrounds the vagina." *Clark*, 558 S.W.2d at 889. If K.M. had testified, as appellant desired, that appellant contacted her "genitals," that would have encompassed the "genital area," i.e., the area surrounding the genitals. Further, it would be untenable to find that the genital area does not include the genitals. Thus, K.M.'s testimony was legally sufficient to prove that appellant contacted her sexual organ with his penis. We overrule point five.

D. Summer of 1991 Aggravated Sexual Assaults

In his third and fourth points, appellant argues that K.M.'s testimony that appellant's penis touched her "genital area" and "pubic area" was legally insufficient to support his two convictions for aggravated sexual assault. As we stated above, "genital area" is sufficient to prove "genitals." Further, K.M. affirmed that appellant's penis was erect when "it was up against [her] genital." We need not decide whether K.M.'s testimony that appellant touched her "pubic area" was sufficient to prove "sexual organ" because K.M. also testified that appellant's penis touched her "genital area" on that occasion. We overrule points three and four.

E. Spring of 1991 Indecency With a Child

In his second point, appellant claims that the evidence was legally insufficient to uphold his conviction for indecency with a child based solely on K.M.'s testimony that appellant touched her "on the pubic hair."

Indecency with a child requires "sexual contact" between the victim and the defendant. TEX. PENAL CODE ANN. § 21.11 (Vernon 1994). Sexual contact is defined as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." *Id.* § 21.01(2). The external genital organs include the mons pubis, which is "the rounded eminence in front of the pubic symphysis [that] is formed by a collection of fatty tissue beneath the integument. It becomes covered with hair at the time of puberty." CHARLES M. GOSS, GRAY'S ANATOMY 1405 (26th ed.1954). Thus, by touching K.M.'s pubic hair, appellant

touched a part of her genitals. The evidence was legally sufficient and we overrule appellant's second point.

III. FAILURE TO REVEAL IMPEACHMENT EVIDENCE

In his first point, appellant argues that the trial court should have granted him a new trial because the State failed to disclose that Eleanor had another man's child while appellant was in prison. The State does not dispute that it did not disclose this evidence to appellant.

We review the denial of a motion for new trial based on newly-discovered evidence under an abuse of discretion standard. *See Driggers v. State*, 940 S.W.2d 699, 709 (Tex.App. – Texarkana 1996, pet. ref'd) (op. on reh'g). The State must produce exculpatory as well as impeachment evidence to a defendant. *See Kyles v. Whitley*, 514 U.S. 419, 432-34, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490, 505 (1995). *See generally Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, the record must reflect that (1) the newly-discovered evidence was unknown to the movant at the time of trial; (2) the movant's failure to discover the evidence was not due to his want of diligence; (3) the evidence was admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the evidence was probably true and would probably bring about a different result in another trial. *See Moore v. State*, 882 S.W.2d 844, 849 (Tex.Crim.App.1994), *cert. denied*, 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); *see also Gowan v. State*, 927 S.W.2d 246, 249 (Tex.App. – Fort Worth 1996, pet. ref'd).

Any evidence showing Eleanor's sexual relationship with another man and proving that she had his baby

would be inadmissible as impeachment evidence. *See* TEX.R.CRIM. EVID. 608(b); *Ramos v. State*, 819 S.W.2d 939, 942 (Tex.App. – Corpus Christi 1991, pet. ref'd). Because the evidence was inadmissible, the State did not have to produce it, and the trial court did not abuse its discretion in not allowing its admission. We overrule point one.

IV. CONCLUSION

Because we find that the evidence was legally sufficient and the trial court did not abuse its discretion in denying appellant's motion for new trial, we affirm the trial court's judgments.[6]

---

[6] Appellant has filed a letter asking us to reprimand or replace his court-appointed attorney. His only complaint with counsel is that counsel is not communicating with him. Unless an appellant waives counsel and chooses to represent himself or shows an adequate reason for new counsel, appellant must accept the counsel appointed by the court. *See Halliburton v. State*, 928 S.W.2d 650, 651-52 (Tex.App. – San Antonio 1996, pet. ref'd); *see also Hubbard v. State*, 739 S.W.2d 341, 344 (Tex.Crim.App.1987). Appellant has done neither, and we deny his requests.

CAUSE NO. F-96-1227-E

BOND: $55,000

DEFENDANT: SCOTT LESLIE CARMELL

CHARGE:
INDECENCY WITH A CHILD (EIGHT COUNTS)
AGGRAVATED SEXUAL ASSAULT (TWO COUNTS),
SEXUAL ASSAULT (FIVE COUNTS)

CO-DEFENDANT: NONE

WITNESS: INV. MILLS, D.A. OFFICE

TRUE BILL OF INDICTMENT

(Filed Dec. 19, 1996)

IN THE NAME AND BY AUTHORITY
OF THE STATE OF TEXAS

COUNT I.

THE GRAND JURORS, in and for the County of Denton, State of Texas, duly organized, impaneled, and sworn as such, at the July Term, A.D., 1996 of the District Court of the 158th Judicial District in and for said county and state, upon their oaths, present in and to said Court that SCOTT LESLIE CARMELL, who is hereinafter styled defendant, on or about the 15th day of February, A.D., 1991 and anterior to the presentment of this Indictment, in the county and state aforesaid, did then and there, with the intent to arouse and gratify the sexual desire of the said SCOTT LESLIE CARMELL, intentionally and knowingly engage in sexual contact with Katharine Michelle Borchert, by touching the genitals of Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of the defendant;

COUNT II.

And the Grand Jurors aforesaid, duly selected, impaneled, swom and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of March, 1991, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there, with the intent to arouse and gratify the sexual desire of the said SCOTT LESLIE CARMELL, intentionally and knowingly engage in sexual contact with Katharine Michelle Borchert, by touching the breast of Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of the defendant;

COUNT III.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of June, 1991, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there intentionally and knowingly cause the sexual organ of Katharine Michelle Borchert, a child younger than 14 years of age and not the spouse of the defendant, to contact the sexual organ of the defendant;

COUNT IV.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of July, 1991, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there intentionally and knowingly cause the sexual organ of Katharine Michelle Borchert, a child younger than 14 years of age who was not the spouse of the defendant, to contact the sexual organ of the defendant;

COUNT V.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of November, 1991, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there, with the intent to arouse and gratify the sexual desire of the said SCOTT LESLIE CARMELL, intentionally and knowingly engage in sexual contact with Katharine Michelle Borchert, by touching the genitals of Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of the defendant;

COUNT VI.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of March, 1992, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there, with the intent to arouse and gratify the sexual desire of the said SCOTT LESLIE CARMELL, intentionally and knowingly engage in sexual contact with Katharine Michelle Borchert, by touching the genitals of Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of the defendant;

COUNT VII.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of June, 1992, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there and knowingly cause the sexual organ of Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of the defendant, to contact the sexual organ of the defendant;

COUNT VIII.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court

as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of March, 1993, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there, with the intent to arouse and gratify the sexual desire of the said SCOTT LESLIE CARMELL, intentionally and knowingly engage in sexual contact with Katharine Michelle Borchert, by touching the breast of Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of the defendant;

COUNT IX.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of June, 1993, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there, with the intent to arouse and gratify the sexual desire of the said SCOTT LESLIE CARMELL, intentionally and knowingly engage in sexual contact with Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of the defendant, by causing Katharine Michelle Borchert to touch the genitals of the defendant;

COUNT X.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to

said court that SCOTT LESLIE CARMELL, on or about the 1st day of July, 1993, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there, with the intent to arouse and gratify the sexual desire of the said SCOTT LESLIE CARMELL, intentionally and knowingly engage in sexual contact with Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of the defendant, by causing Katharine Michelle Borchert to touch the genitals of the defendant;

COUNT XI.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of September, 1993, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there intentionally and knowingly cause the penetration of the female sexual organ of Katharine Michelle Borchert, a child younger than 17 years of age who was not the spouse of the defendant, with the sexual organ of the defendant;

COUNT XII.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 15th day of March, 1994, and anterior to the presentment of this indictment, in the County of Denton and

State of Texas, did then and there intentionally and knowingly cause the penetration of the female sexual organ of Katharine Michelle Borchert, a child younger than 17 years of age who was not the spouse of the defendant, with the sexual organ of the defendant;

COUNT XIII.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of May, 1994, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there intentionally and knowingly cause the penetration of the female sexual organ of Katharine Michelle Borchert, a child younger than 17 years of age who was not the spouse of the defendant, with the sexual organ of the defendant;

COUNT XIV.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of September, 1994, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there, with the intent to arouse and gratify the sexual desire of the said SCOTT LESLIE CARMELL, intentionally and knowingly engage in sexual contact with Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of

the defendant, by causing Katharine Michelle Borchert to touch the genitals of the defendant;

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of September, 1994, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there, with the intent to arouse and gratify the sexual desire of the said SCOTT LESLIE CARMELL, intentionally and knowingly engage in sexual contact with Katharine Michelle Borchert, by touching the genitals of Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of the defendant;

[COUNT] XV.

And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 13th day of March, 1995, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there intentionally and knowingly cause the penetration of the female sexual organ of Katharine Michelle Borchert, a child younger than 17 years of age and not the spouse of the defendant, with the sexual organ of the defendant;

against the peace and dignity of the State.

BRUCE ISAACKS
CRIMINAL DISTRICT ATTORNEY OF
DENTON COUNTY, TEXAS

/s/ Illegible
Foreman of the Grand Jury

NO. F-96-1227-E
COUNT I.

THE STATE OF TEXAS	* IN THE 367TH JUDICIAL
VS.	* DISTRICT COURT OF
SCOTT LESLIE CARMELL	* DENTON COUNTY,
	* TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997
Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	INDECENCY
Convicted of	: W/CHILD (Cnt 1)
Degree	: 2nd
Date Offense Committed	: Feb. 15, 1991
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson

Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50
Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 12 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of INDECENCY WITH A CHILD as alleged in Count I of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count I of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the

jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count I of the indictment, assess punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of INDECENCY WITH A CHILD, as alleged in Count I of the indictment, and that the said defendant committed said offense on or about the 15th day of February, 1991, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence

should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of INDECENCY WITH A CHILD, as alleged in Count I of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT II.

THE STATE OF TEXAS	*	IN THE 367TH JUDICIAL
VS.	*	DISTRICT COURT OF
SCOTT LESLIE CARMELL	*	DENTON COUNTY,
	*	TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997

Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	INDECENCY
Convicted of	: W/CHILD (Cnt 2)
Degree	: 2nd
Date Offense Committed	: March 1, 1991
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson
Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50

Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 12 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of INDECENCY WITH A CHILD as alleged in Count II of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's

plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count II of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count II of the indictment, assess punishment at confinement in the Institutional Division

of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of INDECENCY WITH A CHILD, as alleged in Count II of the indictment, and that the said defendant committed said offense on or about the 15th day of February, 1991, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of INDECENCY WITH A CHILD, as alleged in Count II of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas

Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT III.

THE STATE OF TEXAS	* IN THE 367TH JUDICIAL
VS.	* DISTRICT COURT OF
SCOTT LESLIE CARMELL	* DENTON COUNTY,
	* TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997
Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	AGGR. SEXUAL
Convicted of	: ASSAULT (Cnt 3)
Degree	: 2nd
Date Offense Committed	: June 1, 1991
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson

Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50
Punishment-Place of Confinement	: LIFE in TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 13 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of AGGRAVATED SEXUAL ASSAULT as alleged in Count III of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of AGGRAVATED SEXUAL ASSAULT, as alleged in Count III of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry

Paine, Jr. plea herein, having requested in writing that the jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of AGGRAVATED SEXUAL ASSAULT, as alleged in Count III of the indictment, assess punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of LIFE and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of AGGRAVATED SEXUAL ASSAULT, as alleged in Count III of the indictment, and that the said defendant committed said offense on or about the 1st day of June, 1991, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of LIFE and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of AGGRAVATED SEXUAL ASSAULT, as alleged in Count III of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of Criminal Justice for A term of LIFE and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for a term of LIFE and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT IV.

THE STATE OF TEXAS	*	IN THE 367TH JUDICIAL
VS.	*	DISTRICT COURT OF
SCOTT LESLIE CARMELL	*	DENTON COUNTY,
	*	TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997

Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	AGGR. SEXUAL
Convicted of	: ASSAULT (Cnt 3)
Degree	: 2nd
Date Offense Committed	: July 1, 1991
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson
Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50

Punishment-Place of Confinement	: LIFE in TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 13 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of AGGRAVATED SEXUAL ASSAULT as alleged in Count IV of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment

read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of AGGRAVATED SEXUAL ASSAULT, as alleged in Count IV of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of AGGRAVATED SEXUAL ASSAULT, as alleged in Count IV of the indictment, assess punishment at confinement in the Institutional

Division of the Texas Department of Criminal Justice for a term of LIFE and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of AGGRAVATED SEXUAL ASSAULT, as alleged in Count IV of the indictment, and that the said defendant committed said offense on or about the 1st day of July, 1991, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of LIFE and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of AGGRAVATED SEXUAL ASSAULT, as alleged in Count IV of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the

Texas Department of Criminal Justice for A term of LIFE and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for a term of LIFE and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

_____

NO. F-96-1227-E
COUNT V.

THE STATE OF TEXAS	• IN THE 367TH JUDICIAL
VS.	• DISTRICT COURT OF
SCOTT LESLIE CARMELL	• DENTON COUNTY,
	• TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997
Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	INDECENCY
Convicted of	: W/CHILD (Cnt 5)
Degree	: 2nd
Date Offense Committed	: November 1, 1991
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson

Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50
Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 13 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of INDECENCY WITH A CHILD as alleged in Count V of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count V of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the

jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count V of the indictment, assess punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of INDECENCY WITH A CHILD, as alleged in Count V of the indictment, and that the said defendant committed said offense on or about the 1st day of November, 1991, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence

should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of INDECENCY WITH A CHILD, as alleged in Count V of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT VI.

THE STATE OF TEXAS	•	IN THE 367TH JUDICIAL
VS.	•	DISTRICT COURT OF
SCOTT LESLIE CARMELL	•	DENTON COUNTY,
	•	TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding: : Lee Gabriel

Date of Judgment : Jan. 14, 1997

Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	INDECENCY
Convicted of	: W/CHILD (Cnt 6)
Degree	: 2nd
Date Offense Committed	: March 1, 1992
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson
Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50

Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 13 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of INDECENCY WITH A CHILD as alleged in Count VI of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's

plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count VI of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count VI of the indictment, assess punishment at confinement in the Institutional Division

of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of INDECENCY WITH A CHILD, as alleged in Count VI of the indictment, and that the said defendant committed said offense on or about the 1st day of March, 1992, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of INDECENCY WITH A CHILD, as alleged in Count VI of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas

Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT VII.

THE STATE OF TEXAS	*	IN THE 367TH JUDICIAL
VS.	*	DISTRICT COURT OF
SCOTT LESLIE CARMELL	*	DENTON COUNTY,
	*	TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997
Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	SEXUAL
Convicted of	: ASSAULT (Cnt 7)
Degree	: 2nd
Date Offense Committed	: June 1, 1992
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson

Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50
Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 14 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of SEXUAL ASSAULT as alleged in Count VII of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of SEXUAL ASSAULT, as alleged in Count VII of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the

jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of SEXUAL ASSAULT, as alleged in Count VII of the indictment, assess punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of SEXUAL ASSAULT, as alleged in Count VII of the indictment, and that the said defendant committed said offense on or about the 1st day of June, 1992, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence

should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of SEXUAL ASSAULT, as alleged in Count VII of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of Criminal Justice for A term of TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT VIII.

THE STATE OF TEXAS	•	IN THE 367TH JUDICIAL
VS.	•	DISTRICT COURT OF
SCOTT LESLIE CARMELL	•	DENTON COUNTY,
	•	TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997

Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	INDECENCY
Convicted of	: W/CHILD (Cnt 8)
Degree	: 2nd
Date Offense Committed	: March 1, 1993
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson
Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50

Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 14 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of INDECENCY WITH A CHILD as alleged in Count VIII of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's

plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count VIII of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count VII of the indictment, assess punishment at confinement in the Institutional Division

of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of INDECENCY WITH A CHILD, as alleged in Count VIII of the indictment, and that the said defendant committed said offense on or about the 1st day of March, 1993, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of INDECENCY WITH A CHILD, as alleged in Count VIII of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas

Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

_____

NO. F-96-1227-E
COUNT IX.

THE STATE OF TEXAS	*	IN THE 367TH JUDICIAL
VS.	*	DISTRICT COURT OF
SCOTT LESLIE CARMELL	*	DENTON COUNTY,
	*	TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997
Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	INDECENCY
Convicted of	: W/CHILD (Cnt 9)
Degree	: 2nd
Date Offense Committed	: June 1, 1993
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson

Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50
Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 15 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of INDECENCY WITH A CHILD as alleged in Count IX of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count IX of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the

jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count IX of the indictment, assess punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of INDECENCY WITH A CHILD, as alleged in Count IX of the indictment, and that the said defendant committed said offense on or about the 1st day of June, 1993, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of INDECENCY WITH A CHILD, as alleged in Count IX of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT X.

THE STATE OF TEXAS	• IN THE 367TH JUDICIAL
VS.	• DISTRICT COURT OF
SCOTT LESLIE CARMELL	• DENTON COUNTY,
	• TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997
Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	INDECENCY
Convicted of	: W/CHILD (Cnt 10)
Degree	: 2nd
Date Offense Committed	: July 1, 1993
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson

Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50
Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 15 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of INDECENCY WITH A CHILD as alleged in Count X of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count X of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the

jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count X of the indictment, assess punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of INDECENCY WITH A CHILD, as alleged in Count X of the indictment, and that the said defendant committed said offense on or about the 1st day of July, 1993, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence

should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of INDECENCY WITH A CHILD, as alleged in Count X of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT XI.

THE STATE OF TEXAS	*	IN THE 367TH JUDICIAL
VS.	*	DISTRICT COURT OF
SCOTT LESLIE CARMELL	*	DENTON COUNTY,
	*	TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding: : Lee Gabriel

Date of Judgment : Jan. 14, 1997

Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	SEXUAL
Convicted of	: ASSAULT (Cnt 11)
Degree	: 2nd
Date Offense Committed	: September 1, 1993
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson
Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50

Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 15 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of SEXUAL ASSAULT as alleged in Count XI of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not

guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of SEXUAL ASSAULT, as alleged in Count XI of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of SEXUAL ASSAULT, as alleged in Count XI of the indictment, assess punishment at confinement in the Institutional Division of the Texas

Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of SEXUAL ASSAULT, as alleged in Count XI of the indictment, and that the said defendant committed said offense on or about the 1st day of September, 1993, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of SEXUAL ASSAULT, as alleged in Count XI of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of

Criminal Justice for A term of TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT XII.

THE STATE OF TEXAS	* IN THE 367TH JUDICIAL
VS.	* DISTRICT COURT OF
SCOTT LESLIE CARMELL	* DENTON COUNTY,
	* TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997
Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	SEXUAL
Convicted of	: ASSAULT (Cnt 12)
Degree	: 2nd
Date Offense Committed	: March 15, 1994
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson

Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50
Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 15 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of SEXUAL ASSAULT as alleged in Count XII of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of SEXUAL ASSAULT, as alleged in Count XII of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the

jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of SEXUAL ASSAULT, as alleged in Count XII of the indictment, assess punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of SEXUAL ASSAULT, as alleged in Count XII of the indictment, and that the said defendant committed said offense on or about the 15th day of March, 1994, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence

should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of SEXUAL ASSAULT, as alleged in Count XII of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of Criminal Justice for A term of TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT XIII.

THE STATE OF TEXAS	• IN THE 367TH JUDICIAL
VS.	• DISTRICT COURT OF
SCOTT LESLIE CARMELL	• DENTON COUNTY,
	• TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997

Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	SEXUAL
Convicted of	: ASSAULT (Cnt 13)
Degree	: 2nd
Date Offense Committed	: May 1, 1994
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson
Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50

Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 16 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of SEXUAL ASSAULT as alleged in Count XIII of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not

guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of SEXUAL ASSAULT, as alleged in Count XIII of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of SEXUAL ASSAULT, as alleged in Count XIII of the indictment, assess punishment at confinement in the Institutional Division of the

Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of SEXUAL ASSAULT, as alleged in Count XIII of the indictment, and that the said defendant committed said offense on or about the 1st day of May, 1994, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of SEXUAL ASSAULT, as alleged in Count XIII of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of

Criminal Justice for A term of TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

_____

NO. F-96-1227-E
COUNT XIV.

THE STATE OF TEXAS	*	IN THE 367TH JUDICIAL
VS.	*	DISTRICT COURT OF
SCOTT LESLIE CARMELL	*	DENTON COUNTY,
	*	TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY - NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding:	: Lee Gabriel
Date of Judgment	: Jan. 14, 1997
Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	INDECENCY
Convicted of	: W/CHILD (Cnt 14)
Degree	: 2nd
Date Offense Committed	: September 1, 1994
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson

Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50
Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 16 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of INDECENCY WITH A CHILD as alleged in Count XIV of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count XIV of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the

jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of INDECENCY WITH A CHILD, as alleged in Count XIV of the indictment, assess punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of INDECENCY WITH A CHILD, as alleged in Count XIV of the indictment, and that the said defendant committed said offense on or about the 1st day of September, 1994, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence

should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of INDECENCY WITH A CHILD, as alleged in Count XIV of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

NO. F-96-1227-E
COUNT XV.

THE STATE OF TEXAS	•	IN THE 367TH JUDICIAL
VS.	•	DISTRICT COURT OF
SCOTT LESLIE CARMELL	•	DENTON COUNTY,
	•	TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

(Filed Jan. 15, 1997)

Judge Presiding: : Lee Gabriel

Date of Judgment : Jan. 14, 1997

Attorney for State	: Earl Dobson Paige McCormick
Attorney for Defendant	: Henry Paine, Jr.
Offense	SEXUAL
Convicted of	: ASSAULT (Cnt 15)
Degree	: 2nd
Date Offense Committed	: March 13, 1995
Charging Instrument	: Indictment
Plea	: Not Guilty
Jury Verdict	: Guilty
Presiding Juror	: Terri Tomchesson
Plea to Enhancement	: N/A
Findings On Enhancement	: N/A
Findings on Use of Deadly Weapon	: N/A
Punishment Assessed by	: Jury
Date Sentence Imposed	: Jan. 14, 1997
Costs and additional warrant fee, if any	: $173.50

Punishment-Place of Confinement	: 20 YRS. TDCJ
Date to Commence	: Jan. 14, 1997
Time Credited	: 660 days
Total amount of restitution	:

Concurrent Unless Otherwise Specified.

Restitution to Be Paid To:
Name:
Address:

Art. 6252-13c Registration Required	: YES
Victim's Age	: 16 years of age

The defendant, SCOTT LESLIE CARMELL, having been indicted in the above entitled and numbered cause for the felony offense of SEXUAL ASSAULT as alleged in Count XV of the indictment, and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney, Paige McCormick and/or Earl Dobson, and the defendant, SCOTT LESLIE CARMELL appeared in person, Henry Paine, Jr. counsel, Henry Paine, Jr., also being present, and both parties announced ready for trial, and the said defendant in open court was duly arraigned and in person pled NOT GUILTY to the charge contained in the indictment herein; thereupon a jury to-wit: Terri Tomchesson, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of not

guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open court, by the proper officer, the defendant and Henry Paine, Jr. counsel being present, and in due form of law returned into open court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court to-wit: "We, the jury, find the defendant, SCOTT LESLIE CARMELL, guilty of the offense of SEXUAL ASSAULT, as alleged in Count XV of the indictment."

The defendant having been found guilty by verdict of the jury and heretofore, at the time of entering Henry Paine, Jr. plea herein, having requested in writing that the jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict and afterward was brought into open court by the proper officer, the defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, having found the defendant, SCOTT LESLIE CARMELL, guilty of the offense of SEXUAL ASSAULT, as alleged in Count XV of the indictment, assess punishment at confinement in the Institutional Division of the Texas

Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-."

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said defendant is guilty of the felony offense of SEXUAL ASSAULT, as alleged in Count XV of the indictment, and that the said defendant committed said offense on or about the 13th day of March, 1995, as found by the jury and that he be punished as has been determined by the jury, by confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0-, that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue, and that said defendant be sentenced in accordance with said assessment of punishment.

THEREUPON, the said defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and in appearing to the Court that the defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said defendant, Henry Paine, Jr. counsel also being present, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said defendant, SCOTT LESLIE CARMELL, who has been adjudged to be guilty of SEXUAL ASSAULT, as alleged in Count XV of the indictment, and whose punishment has been assessed by the verdict of the jury at confinement in the Institutional Division of the Texas Department of

Criminal Justice for A term of TWENTY (20) YEARS and a fine of $-0-, to be delivered by the Sheriff of Denton County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts, and said defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for a term of TWENTY (20) YEARS and a fine of $-0- in accordance with the provisions of the law governing the Institutional Division of the Texas Department of Criminal Justice of said State and the said defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the defendant is granted 660 days credit for time served.

SIGNED this the 14 day of January, 1997.

/s/ Lee Gabriel
JUDGE PRESIDING

January 14, 1997
DATE SIGNED

Notice of Appeal: _____

I AM THE PERSON WHO RECEIVED THIS JUDGMENT AND SENTENCE ASSESSED ON THIS DATE.

01-14-97 DATE

/s/ Scott L. Carmell

[Right Thumbprint Omitted in Printing]

(6)

Supreme Court, U.S.
FILED
SEP 17 1999
OFFICE OF THE CLERK

7540
No. 98-~~7450~~

In The
Supreme Court of the United States

SCOTT LESLIE CARMELL,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Appeals

BRIEF OF PETITIONER

RICHARD D. BERNSTEIN*
CARTER G. PHILLIPS
KATHERINE L. ADAMS
PAUL A. HEMMERSBAUGH
BRIAN C. KALT
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

**Counsel of Record*

September 17, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

43 pp

QUESTION PRESENTED

Whether the retroactive application of a criminal statute that repeals a statutory requirement of two witnesses to convict a criminal defendant violates the Ex Post Facto Clause in Article I, Section 10 of the Constitution, because it requires "less . . . testimony, than the law required at the time of the commission of the offence, in order to convict the offender," *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798), and, in addition, because it eliminates a defense on the merits.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

CONSTITUTION AND STATE STATUTES

TABLE OF AUTHORITIES – Continued

LEGISLATIVE HISTORY

FOREIGN STATUTE

SCHOLARLY AUTHORITY

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

OPINION BELOW

The decision of the court of appeals affirming Petitioner's conviction is reported at *Carmell* v. *Texas*, 963 S.W.2d 833 (Tex. App.-Fort Worth 1998, pet. ref'd).

JURISDICTION

The judgment of the Texas Court of Appeals was entered on February 12, 1998. The Texas Court of Criminal Appeals denied review on September 16, 1998. The *pro se* Petition for Writ of Certiorari was filed on December 14, 1998, and granted on June 14, 1999. This Court appointed counsel for Petitioner on July 21, 1999. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Ex Post Facto Clause of the United States Constitution, Article I, Section 10, provides in pertinent part: "No State shall . . . pass any . . . ex post facto law."

2. Texas Code of Crim. Proc. article 38.07 (1983); Texas Code of Crim. Proc. Article 38.07 (1993); and Texas Penal Code Sections 21.11, 22.011, and 22.021.

STATEMENT OF THE CASE

A. The Statutory Change

In 1983, the Texas Legislature enacted a law governing certain types of sexual offense prosecutions. That law provided, in pertinent part:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense.

Tex. Code Crim. Proc. art. 38.07 (1983).[1]

Effective September 1, 1993, the Texas Legislature amended Article 38.07 of the Texas Code of Criminal Procedure to read, in pertinent part:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. The

[1] Texas Penal Code Chapter 21 covers sexual offenses, including indecency with a child (section 21.11). Texas Penal Code Chapter 22 covers "Assaultive Offenses," including sexual assault (section 22.011) and aggravated sexual assault (section 22.021).

> requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 18 years of age at the time of the alleged offense.

Tex. Code Crim. Proc. art. 38.07 (1993), Acts 1993, 73rd Leg., ch. 900, § 12.01.

B. The Alleged Crimes and Trial

Although Petitioner contests the facts as found by the Texas Court of Appeals, the factual recitation herein is based upon the opinion of the Texas Court of Appeals in *Carmell* v. *Texas*, 963 S.W.2d 833 (Tex. App.-Fort Worth 1998, pet. ref'd), *cert. granted*, 119 S. Ct. 2336 (1999). Petitioner Scott Leslie Carmell married Eleanor in 1988, and became the stepfather of "KM," a daughter born to Eleanor and her previous husband on March 24, 1978.[2] Carmell gave back rubs to KM every night before she went to bed. Some time in the Spring of 1991, Carmell touched KM on her pubic hair during one of the back rubs. Later that Spring, Petitioner touched KM's breast. On two occasions in the summer of 1991, Petitioner caused his penis to touch KM's genital area.

Approximately one year later, in June 1992 (when KM was 14), Petitioner's penis touched KM's genital area. *Id.* at 835. In March 1993, Petitioner touched KM's breast. On or about June 1, 1993 and July 1, 1993, Petitioner caused KM to touch his genitals.

[2] To protect the identity of the complaining witness, this brief follows the Court of Appeals' practice of referring to her as "KM," and by not identifying her mother's surname.

In September 1993, when KM was fifteen, she and Petitioner had sexual intercourse for the first time. KM and Petitioner had sexual intercourse on several subsequent occasions, ending in March 1995. KM did not tell her mother or anyone else about her sexual contact with Petitioner until March 1995. KM reported Petitioner's alleged conduct to the police in March 1995.

Petitioner was indicted in Texas district court on eight counts of indecency with a child, five counts of sexual assault, and two counts of aggravated sexual assault on December 19, 1996. Petitioner pleaded not guilty to each count of the indictment. Petitioner's trial on the indictment commenced on January 6, 1997. There was no testimony offered at trial to corroborate KM's account of the sexual contact between KM and Petitioner. On January 9, 1997, the jury returned a verdict of guilty on all counts. On January 10, 1997, the jury returned a sentencing verdict imposing the maximum prison sentence allowed by law on each count, which resulted in two life sentences and several 20 year sentences, to be served concurrently.[3]

C. The Retroactive Application of the 1993 Statute

All of the conduct alleged in Counts 7 – 10 of the indictment occurred before the effective date of amended

[3] Petitioner was sentenced to life imprisonment on Counts 3 and 4, and 20 years in prison for each of the other counts. The trial court judgment shows the prison sentences are to be served concurrently. J.A. 22-104.

Article 38.07, but after KM turned 14.[4] The corroboration statute in effect at the time of the conduct alleged in Counts 7 – 10 of the indictment provided, in pertinent part:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code [*viz.* for a sexual offense], *is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement* that the victim inform another person of an alleged offense *does not apply if the victim was younger than 14 years of age at the time of the alleged offense.*

Tex. Code Crim. Proc. art. 38.07 (1983) (emphases added). Thus, the pre-amendment statute required eyewitness corroboration to support a conviction except in cases in which the alleged victim either (1) informed another person within six months of the alleged offense; or (2) was younger than age 14. Neither exception applies to the counts of conviction challenged here.[5] See *Carmell*, 963

[4] Count 7 alleged sexual assault on or about June 1, 1992. Counts 8 – 10 alleged indecency with a child, occurring on or about March 1, 1993, June 1, 1993, and July 1, 1993, respectively. J.A. 16-18.

[5] Respondent did not attempt at trial to satisfy the corroboration requirement contained in the pre-amendment version of Article 38.07. There was no eyewitness testimony, or any other contemporaneous evidence, introduced at trial to support KM's testimony regarding Petitioner's alleged conduct. The corroborating testimony required by Article 38.07 is testimony by an eyewitness to the alleged conduct. *E.g.*, *Shelby*

S.W.2d at 836; see generally Resp't's Br. in Opp. to Cert. at 5-7. Accordingly, under the terms of the statute in effect at the time of the alleged conduct, as a matter of law, Petitioner could not have been convicted of the crimes alleged in Counts 7 – 10, because KM's testimony was uncorroborated. See Tex. Code Crim. Proc. Art. 38.07 (1983).

Effective September 1, 1993, the Texas Legislature amended the statute to eliminate the corroboration requirement for alleged victims under the age of 18:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which

---

v. *Texas*, 800 S.W.2d 584, 586 (Tex. App. 1990) (for purposes of corroboration statute, " '[u]ncorroborated testimony' means absence of any eye-witness other than the victim"), *rev'd on other grounds*, 819 S.W.2d 544 (Tex. Crim. App. 1991); *Heckathorne* v. *Texas*, 697 S.W.2d 8, 12 (Tex. App. 1985, pet. ref'd) ("We believe art. 38.07 speaks to cases . . . wherein the State seeks a conviction in the *absence* of any eyewitness . . . other than the young victim. 'The lack of any other eyewitness' is what is meant in Article 38.07 by 'uncorroborated testimony.' "); *see Bowers* v. *Texas*, 914 S.W.2d 213, 215 (Tex. App. 1996, pet. ref'd) (holding that retroactive application of amended Article 38.07 would be *ex post facto* violation, finding "[the victim] was the only witness to testify about the assault. Her testimony was uncorroborated."); *Friedel* v. *Texas*, 832 S.W.2d 420, 421-22 (Tex. App. 1992, no pet.) (applying pre-amendment version of Article 38.07 to hold lack of outcry within six months and lack of evidence to corroborate victim's account compelled acquittal; court suggested this was harsh result, but found result was compelled by clear language of statute and intent of legislature).

> the offense is alleged to have occurred. *The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 18 years of age at the time of the alleged offense.*

Tex. Code Crim. Proc. art. 38.07 (1993), Acts 1993, 73rd Leg., ch. 900, § 12.01 (emphasis added). Because it is undisputed that KM did not inform anyone of the alleged conduct until well over a year after the last offense at issue in this Petition (Count 10 of the indictment), the 1993 statutory change in the outcry period from six months to one year is irrelevant here. Rather, Petitioner's conviction on Counts 7 – 10 was possible solely because of the retroactive application of the 1993 substantive amendment to Texas criminal law that eliminated the requirement for conviction of a second witness to corroborate the account of the complaining witness.

D. The State Appeals Court Decision

On appeal, Petitioner raised several challenges, including a challenge to the prosecution's admitted failure to disclose impeachment evidence; the sufficiency of testimony that Petitioner touched KM's "genital area" to prove the type and level of sexual contact required to prove sexual assault; and a challenge to the retroactive application of the 1993 amendment to Article 38.07 to Petitioner's pre-amendment conduct as an unconstitutional *ex post facto* law. See *Carmell*, 963 S.W.2d 833.[6] The

---

[6] Carmell's *ex post facto* appeal directly applied only to the charges in Counts 7 – 10. J.A. 16-18. Similarly, the *ex post facto*

Texas Court of Appeals rejected Petitioner's challenges and affirmed his conviction. *Id.* at 838. Petitioner sought and was denied discretionary review in the Texas Court of Criminal Appeals. *Carmell* v. *Texas*, No. 837-98 (Tex. Crim. App. Sept. 16, 1998).

Carmell filed a Petition for Writ of Certiorari with this Court. The Court granted the Petition, confining its consideration to the *ex post facto* and due process issues set forth in the Petition's first question. *Carmell* v. *Texas*, 119 S. Ct. 2336 (1999).[7]

SUMMARY OF ARGUMENT

Straightforward and longstanding *ex post facto* principles demonstrate that Texas' conviction of Petitioner on the testimony of one witness, when the law in effect at the time of his conduct required the testimony of two witnesses, violates the Constitution. The retroactive application of the amendment to Article 38.07 of the Texas Code of Criminal Procedure falls squarely within a category of prohibited retroactive criminal laws set forth in this Court's landmark *ex post facto* decision, *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798). That decision, written by

issues raised in this Petition ask this Court to reverse Carmell's conviction on those four counts only; Petitioner's remaining convictions are not directly at issue.

[7] Because the Ex Post Facto Clause in Article I, Section 10 directly applies to the states and the precedent under that Clause expressly addresses the question presented, this brief does not address any additional due process limitations on retroactivity.

Justice Chase shortly after ratification of the Constitution, enumerated four types of laws repugnant to the Ex Post Facto Clause, among them: "4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, that the law required at the time of the commission of the offence, in order to convict the offender." *Id.* at 390. Justice Chase's inclusion of this fourth category stemmed directly from *ex post facto* acts passed by the British Parliament, particularly one involving the case of Sir John Fenwick. In that case, Parliament "violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two" (*id.* at 389) to convict Fenwick of treason and to sentence him to death. So too here. Texas convicted Petitioner of a crime on the testimony of one witness when the law in effect at the time of his conduct required the testimony of two witnesses. This is a clear violation of the Ex Post Facto Clause because it allowed the conviction of Petitioner on less evidence than required by the law in effect when the underlying conduct occurred.

The Framers believed the purpose of the Ex Post Facto Clause – to prevent politically responsive legislatures from retroactively changing criminal laws in order to convict a class of unpopular defendants – was vital to the protection of individual liberty. This protection was considered so important that the state Ex Post Facto Clause was among very few express limits on state power in the original Constitution. The fourth category of *Calder* v. *Bull* reflects the original understanding of the scope of this fundamental protection.

During the ensuing two hundred years, this Court has consistently reaffirmed that the *Calder* categories are

the foundation of *ex post facto* jurisprudence. Indeed, the Court recently re-emphasized that the "prohibition which may not be evaded is the one defined by the *Calder* categories." *Collins* v. *Youngblood*, 497 U.S. 37, 46 (1990).

Applying the Ex Post Facto Clause here will result in limited but vital protection of individual rights without restricting the states' ability to implement routine changes to rules of evidence or other criminal procedures. Although the fourth category of *Calder* v. *Bull* provides an essential protection against overreaching legislative acts, properly construed it is not applicable to most retroactive evidentiary changes. It applies only to those changes that allow conviction based on "less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Calder*, 3 U.S. at 390. Thus, changes to neutral rules of general application (for example, changes to the Federal Rules of Evidence governing hearsay and similar matters) which may help the prosecution in one case and help a defendant in another, are not within the *Calder* prohibitions and do not run afoul of the Ex Post Facto Clause.

Retroactive application of the 1993 amendment to Petitioner's pre-amendment conduct also violated the Ex Post Facto Clause because it deprived him of an absolute defense available at the time of his conduct. Laws prohibited by the Ex Post Facto Clause include "any statute . . . which deprives one charged with [a] crime of any defense available at the time when the act was committed." *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925). Under the law in effect at the time of Petitioner's conduct, he had an absolute defense on the merits to Counts 7 – 10, because

the prosecution produced no testimony to corroborate the account of the complaining witness. This defense goes to "guilt or innocence," *id.* at 170, as a two-witness rule is designed to prevent erroneous convictions. Like *Calder*, the *Beazell* formulation of the reach of the Ex Post Facto Clause has been recently and unequivocally endorsed by this Court. *Collins*, 497 U.S. at 43.

The assertion of the Texas Court of Appeals that the amendment to Article 38.07 was procedural is both irrelevant and incorrect. *Collins* reaffirms that the *ex post facto* prohibition is not avoided merely because a law is labeled "procedural." *Collins*, 497 U.S. at 46. The touchstone for *ex post facto* purposes is whether the change affects substantive rights. The 1993 amendment to Article 38.07 indubitably affected Petitioner's substantive rights, because it permitted his conviction on the testimony of one, rather than two, witnesses, and eliminated a defense on the merits. In any event, the amendment at issue has a clear substantive purpose: making it easier to obtain convictions of those charged with sex offenses against teenagers. And, regardless of the characterization employed by the State, as a matter of federal law (which governs here, in interpreting the Ex Post Facto Clause), burden of proof issues are matters of substance, not procedure.

Petitioner's conviction on Counts 7 – 10 should be reversed.

ARGUMENT

I. RETROACTIVE APPLICATION OF THE 1993 AMENDMENT TO ARTICLE 38.07 VIOLATED THE EX POST FACTO CLAUSE BY REDUCING THE AMOUNT OF PROOF NECESSARY TO SUPPORT A CONVICTION.

A. Retroactive Application Of The 1993 Amendments Violated The Ex Post Facto Clause By Reducing The Amount Of Evidence Necessary For Conviction, Contrary To The Fourth Category Of *Calder* v. *Bull*.

"Our understanding of what is meant by *ex post facto* largely derives from the case of *Calder* v. *Bull*, 3 Dall. 386 (1798)." *Miller* v. *Florida*, 482 U.S. 423, 429 (1987). Barely a decade after the ratification of the Constitution, Justice Chase enumerated four types of laws "within the words and intent of the prohibition" against *ex post facto* laws:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. *Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.*

Calder v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis added). In the lead opinion for a Court whose members included Framers of the Constitution, Justice Chase detailed the abuses of the British Parliament prior to the

American Revolution that led the Framers to prohibit the states, as well as the federal government, from enacting *ex post facto* laws. The abuses Justice Chase described included retroactive acts of Parliament that "violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two." *Id.* at 389. At the end of his survey of legislative abuses, Chase concluded, "[t]o prevent such, and similar, acts of violence and injustice . . . the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any *ex post facto* law." *Id.*

Under the clear language of *Calder* and the history it summarizes, this is not a difficult case. The action of the State of Texas in this case – convicting Petitioner of a crime on the testimony of one witness when the law in effect at the time of the person's conduct required at least two witnesses – is a violation of the Ex Post Facto Clause, because Texas allowed "less . . . testimony" to support convictions on Counts 7 – 10 "than the law required at the time of" Petitioner's alleged conduct. *Id.* at 390.

Under the law in effect at the time of the conduct, Petitioner simply could not have been convicted of Counts 7 – 10. The absence of testimony corroborating the account of complaining witness KM would have operated as an absolute bar to conviction on those counts. Petitioner's conviction on those counts was made possible solely by the September 1993 retroactive legislative removal of the corroboration requirement for those offenses. See *supra* pp. 4-7, *infra* pp. 25 n.14, 29-30. This retroactive reduction of the amount of proof required for conviction is proscribed by the Ex Post Facto Clause as explicated by the fourth category of *Calder* v. *Bull*.

B. The Fourth Category Of *Calder* v. *Bull* Is Essential To Fulfillment Of The Purpose Of The Ex Post Facto Clause.

The fourth category of *Calder* v. *Bull* should be reaffirmed by this Court because it falls squarely within a fundamental purpose of the Ex Post Facto Clause: to prevent legislatures inclined to respond to an emotionally charged electorate from changing criminal laws after the fact in order to convict a class of unpopular defendants. A "solid foundation of American law" is "the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place . . . [This principle] has timeless and universal human appeal.' " *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994); *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). The dual Ex Post Facto Clause in the Constitution[8] embodies this solid foundation.

The Framers rightly considered the Clause a vital protection of individual liberty, one of the few deemed worthy of inclusion in the original Constitution, prior even to the adoption of the Bill of Rights. Even more significant, the ban on state *ex post facto* laws was one of the very few limits on *state* powers embodied in the original Constitution. See, *e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (Chief Justice Marshall described art. I, § 10, cl. 1, as "a bill of rights for the people of each state"); *The Federalist No. 44*, at 282 (James Madison)

[8] U.S. Const. art. I, § 9, cl. 3 (barring federal *ex post facto* laws); *id.* § 10, cl. 1 (barring state *ex post facto* laws).

(Clinton Rossiter ed., 1961); James Iredell ("Marcus"), *Answers to Mr. Mason's Objections to the New Constitution* (1788), *reprinted in Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787-1788*, at 368 (Paul L. Ford ed., De Capo Press 1968) (1888) (referring to Ex Post Facto Clause as "one of the most valuable parts of the new constitution," and stating that "[t]his very clause, I think, is worth ten thousand declarations of rights, if this, the most essential right of all, was omitted in them"). Indeed, the bans on *ex post facto* laws, bills of attainder, and impairment of contracts were essentially the only express limits on the States' actions affecting individual liberty in the pre-amendment Constitution. See generally U.S. Const. art. I, § 10. The few other limitations on the States set forth in the pre-amendment Constitution were primarily concerned with the relationship of the States to the federal government in a federal system. See *id.* (prohibiting states from, *inter alia*, entering treaties, coining money, and imposing duties on imports and exports).

The Ex Post Facto Clause embodies the principle that politically responsive legislatures should create penal policy solely on a prospective basis, while the impartial judiciary is charged with the application of those policies to specific actors and conduct. See, *e.g.*, *Miller*, 482 U.S. at 430; *Weaver* v. *Graham*, 450 U.S. 24, 29 n.10 (1981); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 513 (1989) (Stevens, J., concurring) ("Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political

process to punish or characterize past conduct of private citizens."); *Ogden* v. *Blackledge*, 6 U.S. (2 Cranch) 272, 277 (1804); see also Joseph Story, *Commentaries on the Constitution of the United States* § 1338 n.28 (1833); John Hart Ely, *Democracy and Distrust* 90 (1980). Cf. *Calder*, 3 U.S. at 389 (Chase, J.) (British *ex post facto* laws were "legislative judgments" and thus "an exercise of judicial power").

The Ex Post Facto Clause was enacted in response to the Framers' fear – based on contemporary examples in Great Britain – that a legislature could use *ex post facto* laws to single out unpopular groups or individuals for retroactive application of new criminal laws. One significant example of such vindictive legislation that was familiar to the Framers' generation is the 1696 case of Sir John Fenwick. See generally An Act to Attaint Sir John Fenwick Baronet of High Treason, 8 Will. 3, ch. 4 (1696) (Eng.). Fenwick was indicted for high treason, a charge that required at least two witnesses, but Fenwick had secured the absence of the second witness. See *Mattox* v. *United States*, 156 U.S. 237, 240 (1895). Parliament allowed Fenwick to be convicted and sentenced to death anyway, on the testimony of the remaining witness. In *Calder*, Justice Chase cited Fenwick's case as a paradigmatic improper *ex post facto* law, noting that Parliament had "violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two." *Calder*, 3 U.S. at 389 (Chase, J.). Petitioner's challenged convictions here also rest on the retroactive repeal of a two-witness rule.

As Justice Harlan once noted, the Ex Post Facto Clause:

> rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or *classes of persons*.

James v. *United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., separate opinion) (emphasis added). The Ex Post Facto Clause thus provides critical safeguards of individual liberty, protecting unpopular groups or individuals from the potentially arbitrary, capricious, and vindictive actions of a powerful State. See *Miller*, 482 U.S. at 429; *Weaver*, 450 U.S. at 29; see also *Landgraf*, 511 U.S. at 266 (noting that popularly elected legislatures, in response to political pressures, "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.").[9]

Plainly, the legislative purpose here was to exact retribution against a paradigmatically unpopular group – alleged sex offenders. In an analysis of the 1993 bill that amended Article 38.07 done for the Texas House of Representatives, supporters of the bill stated that the "[c]urrent [outcry or corroboration requirement] creates

---

[9] This is not the only purpose served by the Ex Post Facto Clause. As *Miller* explained, the Clause is additionally "aimed at a second concern, namely, that legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.' " 482 U.S. at 430 (quoting *Weaver*, 450 U.S. at 28-29)).

an absurd obstacle for prosecuting [sexual assault] cases. . . . The outcry [or corroboration] requirement is an especially difficult obstacle to overcome in sexual assault and other sexual offense cases." House Research Org., *Bill Analysis* 14 (Mar. 15, 1993) (analyzing HB 261) (a copy of this document has been lodged with the Clerk of Court).

As societal views of a particular crime change, a legislature may become more willing to find a given class of defendants guilty based on less evidence. A law specifying the minimum amount of proof necessary for conviction is inextricably intertwined with the question of the defendant's guilt. See *infra* pp. 25-28, 32-34. The prosecution's failure to produce the minimum amount of proof requires a judgment of not guilty. It is, of course, entirely proper for a legislature to reduce the minimum amount of proof necessary for conviction, provided that change in the criminal law is accomplished prospectively.

It is not surprising, however, that Texas singled out those accused of sexual misconduct for a retroactive change in the minimum amount of proof necessary for conviction. History tells us that these kinds of legislative attempts to guarantee convictions for past conduct by reducing the legally required amount of proof are reserved for those accused of the most heinous crimes, such as treason, murder, or sexual offenses, *supra* pp. 8-9, 16-17; *infra* p. 21 n.11.

Convicting sex offenders is a laudable and important purpose of the criminal law. But the Ex Post Facto Clause requires that expansions of the criminal law be pursued prospectively. Prospective application of new criminal

laws fully vindicates society's interest in general deterrence, because a new criminal law cannot deter conduct that already has occurred. And, society's interest in retribution for, or specific deterrence of, an individual defendant does not provide a legitimate basis for exceptions to the Ex Post Facto Clause as, virtually by definition, such exceptions would swallow the rule. As Justice Story stated:

> If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the laws, provide against the commission or future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may rise from the infraction of a rule, upon which the purity of public justice, and the existence of civil liberty, essentially depend.

Joseph Story, *Commentaries on the Constitution of the United States* § 1338 n.28.

Because the legitimate goals of the amended Article 38.07 can be met fully by prospective application of the new rule, there is no reason to depart from the original understanding of the Ex Post Facto Clause set forth in *Calder* v. *Bull*. Indeed, this Court has noted that " *'ex post facto* law' was a term of art with an established meaning at the time of the framing of the Constitution," and that *Calder* reflects that meaning. *Collins* v. *Youngblood*, 497 U.S. 37, 41-42 (1990). *Collins* thus rightly emphasized the

continuing importance of "the original understanding of the *Ex Post Facto* Clause." *Collins*, 497 U.S. at 43.[10]

Finally, it is important to note that the fourth category of *Calder* does *not* cover all retroactive changes in the rules of evidence. It applies only if the change permits *"less, or different, testimony, than the law required* at the time of the commission of the offence, *in order to convict the offender."* *Calder*, 3 U.S. at 390 (emphases added). For example, routine changes in the Federal Rules of Evidence governing relevance, hearsay, leading questions and the like would not fall within the fourth category. See *Collins*, 497 U.S. at 43 n.3. Indeed, no rule in the Federal Rules of Evidence specifies the minimum amount of evidence required for conviction. Rather, the Federal Rules of Evidence are neutral rules of general application; in one case a given rule may help the prosecutor and in another case the same rule may help the defendant. Unlike the amended Article 38.07, the Federal Rules of Evidence do not single out a specific class of unpopular defendants for retroactive application of a new rule designed to increase substantially their likelihood of conviction.

---

[10] The Ex Post Facto Clause is different from other constitutional provisions that apply to criminal trials, such as the Confrontation Clause, in that a ruling that a state law is unconstitutional under other provisions *prevents both retrospective and prospective* application of that law. In light of that prospective effect, it is understandable that changing societal understandings of what is required for general deterrence have played a role in this Court's interpretations of *other* constitutional provisions. *See, e.g., Maryland* v. *Craig*, 497 U.S. 836, 853-55 (1990).

C. Later Decisions By This Court Explicitly Reaffirm The Continuing Vitality Of The Fourth *Calder* Category.

As Justice Story recognized, by 1833 it was well settled that the Ex Post Facto Clause barred retroactive changes in the criminal law "whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed." Story, *Commentaries on the Constitution of the United States* § 1339. Indeed, for the past two centuries, lower courts have enforced *Calder*'s fourth category against laws attempting to change retroactively the minimum amount of proof required for conviction of a variety of crimes.[11] Over the

---

[11] *See, e.g., Bowen* v. *Arkansas*, 911 S.W.2d 555, 562-64 (Ark. 1995) (retroactive application of aggravating factor in felony murder case violates Ex Post Facto Clause); *Minnesota* v. *Niska*, 514 N.W.2d 260, 265 (Minn. 1994) (retroactive application of statute shifting burden of proving affirmative defense of justification from prosecution to defendant held unconstitutional *ex post facto* law); *United States* v. *Alexander*, 805 F.2d 1458, 1461 n.2 (11th Cir. 1986) (retroactive application of heightened burden of proof of insanity violated Ex Post Facto Clause); *Pennsylvania* v. *Hoetzel*, 426 A.2d 669, 672 (Pa. Super. Ct. 1981) (retroactive change in burden of proving amount of controlled substance violated Ex Post Facto Clause); *Idaho* v. *Byers*, 627 P.2d 788, 795-96 (Idaho 1981) (court abolished corroboration requirement for sexual assault, but refused to apply retroactively because to do so would violate *ex post facto* prohibition); *Virgin Islands* v. *Civil*, 591 F.2d 255, 259-60 (3rd Cir. 1979) (retroactive application of repeal of corroboration requirement for criminal conviction was an unconstitutional *ex post facto* law); *Delaware* v. *Moyer*, 387 A.2d 194, 197 (Del. 1978) (in capital murder case, retroactive application of statute placing burden on defendant to prove mitigating factor would violate Ex Post Facto Clause by allowing punishment on " 'less

same period, all four of the *Calder* categories have remained the foundation of *ex post facto* precedent in this Court, and this Court has never undertaken to restrict the core applications of any of *Calder*'s categories.[12]

---

or different testimony' "); *United States* v. *Williams*, 475 F.2d 355, 356-57 (D.C. Cir. 1973) (retroactive application of statute shifting burden to prove insanity to defendant violated Ex Post Facto Clause); *United States* v. *Bell*, 371 F. Supp. 220, 221-22 (E.D. Tex. 1973) (retroactive application of statutory change to eliminate requirement of two witnesses for perjury conviction violates Ex Post Facto Clause by allowing the government to rely upon "less onerous proof"); *United States* v. *Hise*, 42 C.M.R. 195, 196-97 (C.M.A. 1970) (overturning sodomy conviction of naval officer, even though he confessed, because trial court retroactively applied reduced corroborating evidence standard); *New York* v. *Caifa*, 299 N.Y.S. 838, 839 (N.Y. App. Div. 1937) (retroactive change in proof required to prove perjury violates Ex Post Facto Clause); *Goode* v. *Florida*, 39 So. 461, 461-62 (Fla. 1905) (applying law requiring two witnesses for conviction of illegal alcohol sales, even though law had been repealed – to apply new law retroactively would violate Ex Post Facto Clause); *Hart* v. *Alabama*, 40 Ala. 32, 34-35 (Ala. 1866) (court refused to apply law eliminating requirement of corroborating testimony for gambling conviction to conduct occurring before change in the law, lack of corroborating witness compelled acquittal).

[12] Prior to the decision below, Texas courts had also applied *Calder*'s fourth category. *See, e.g., Aylor* v. *Texas*, 727 S.W.2d 727, 729 (Tex. App. 1987, pet. ref'd) (finding retroactive application of change in law would constitute impermissible *ex post facto* law by allowing conviction on "less or different evidence," but holding defendant waived this objection by failing to raise it at trial); *see also Holt* v. *Texas*, 2 Tex. 363, 364 (Tex. 1847) (using *Calder* categories to apply Ex Post Facto Clause of Texas Constitution).

Earlier this decade, the Court confirmed the continuing vitality of *Calder* and the four categories it describes, holding that the constitutional *ex post facto* "prohibition which may not be evaded is the one defined by the *Calder* categories." *Collins*, 497 U.S. at 46; see *Lynce* v. *Mathis*, 519 U.S. 433, 441 n.13 (1997) (quoting the four categories of *ex post facto* laws proscribed by *Calder*). On numerous occasions, the Court has left intact the core prohibition enunciated in *Calder*'s fourth category: Laws that retroactively change the amount of proof essential for conviction of a crime are unconstitutional.

In *Cummings* v. *Missouri*, the Court struck down as an unconstitutional *ex post facto* law a provision of the Missouri constitution applied retroactively to punish a person for conduct occurring prior to the adoption of the state constitution. 71 U.S. (4 Wall.) 277 (1866). The Court defined "an *ex post facto* law" to include "one which . . . changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Id.* at 325-26.[13]

Later cases that have upheld the retroactive application of new procedural laws have been careful to distinguish them from *Calder*'s fourth category. Eighteen years

---

[13] Although the dissent in *Cummings* would have held that the law in question was civil, and thus not subject to the *ex post facto* prohibition, it agreed that the four *Calder* categories were definitive, noting that *Calder*'s "exposition of the nature of *ex post facto* laws has never been denied." *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 391 (1866) (Miller, J., Chase, C.J., Swayne and Davis, JJ., combined dissent for *Cummings* and *Garland*).

after *Cummings*, the Court upheld the retrospective application of a procedural change to state law whose effect was to make convicted felons competent to testify at trial. *Hopt* v. *Utah*, 110 U.S. 574 (1884). Under Utah law in effect at the time of the defendant's conduct, felons were not allowed to testify in criminal trials. After the date of the defendant's conduct, but before trial, Utah changed its law and allowed felons to testify. *Id.* at 587-88. This Court held that the expansion of persons eligible to testify was merely a procedural change that did *not* change the "quantity or the degree of proof necessary" to convict the defendant, explaining that "[s]tatutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage, for they do *not* . . . lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." *Id.* at 589 (second emphasis added).

This case would be within the class of changes allowed by *Hopt* if Texas had retained the corroboration requirement, but retroactively changed Texas law to allow felons to provide the corroborating testimony. What Texas did here, however, was to reduce the amount of evidence and number of witnesses required for conviction, not merely change who was allowed to be a witness. Nor can the two Texas statutes at issue in this case be viewed as witness competency rules based on the youth of the witnesses. To the contrary, under either statute, a defendant could be convicted based on the uncorroborated testimony of a 13-year-old, or a 5-year old. Rather, the statutes reflect a policy judgment about the risk of

convictions based on uncorroborated, and thus potentially false, allegations.[14] The legislature changed its judgment on this question in 1993, and the 1993 amendment to Article 38.07 was designed to make conviction markedly easier. See *supra* pp. 17-18. Stated differently, the 1993 legislature was willing to accept the greater risk of an erroneous conviction inherent in making a reduced amount of proof sufficient for conviction. Under *Calder* v. *Bull*, however, such a change may only be applied prospectively.

A second important difference between the situation in *Hopt* and this case is that the amendment to Article

---

[14] *See, e.g.*, *Scoggan* v. *Texas*, 799 S.W.2d 679, 683 (Tex. Crim. App. 1990) (en banc) ("The [1983] amendment to 38.07 clearly expresses the legislature's intent to shield sexual assault victims under 14 from the normal outcry or corroboration requirements, but to require stricter proof when the sexual assault victim is 14 or older."); *Ex parte Merrill*, 201 S.W.2d 232, 233-34 (Tex. Crim. App. 1947) ("[A sexual assault] conviction will not be sustained upon the uncorroborated testimony of the prosecutrix who failed to make prompt outcry or report of the [sexual assault] when opportunity to do so was reasonably afforded. Such rule is founded not upon the idea that such failure to make outcry tends to connect the prosecutrix with the alleged crime and therefore require that she be corroborated as an accomplice but because it tends to lessen or diminish the credit to be given to her testimony." (citations omitted)); *Tyrone* v. *Texas*, 854 S.W.2d 153, 155 (Tex. App. 1993, pet. ref'd); *see generally* 7 John Henry Wigmore, *Evidence* § 2061, at 457 (James H. Chadbourn rev., 1978); Note, *Corroborating Charges of Rape*, 67 Colum. L. Rev. 1137, 1137 (1967) ("Because of the inordinate danger that innocent men will be convicted of rape, some states have adopted the rule that the unsupported testimony of the complaining witness is not sufficient evidence to support a rape conviction.").

38.07 is not neutral; when it applies, it will always and invariably work to the disadvantage of the defendant. Admitting into evidence at trial the testimony of a class of persons who had previously been barred from testifying is a neutral and generally applicable change that might help or might hurt a particular defendant, depending on the nature of the additional testimony. For example, the testimony of a convicted felon might provide a defendant with alibi testimony or other exculpatory evidence. In contrast, the 1993 amendment to Article 38.07 indisputably will always disadvantage defendants in Petitioner's circumstances, by allowing conviction on proof that would have been legally inadequate at the time of the alleged conduct. See *Miller*, 482 U.S. at 431-32 (retroactive change in law that disadvantages the accused without any "ameliorative" effect violates prohibition against *ex post facto* laws). Elimination of the requirement of corroborating testimony to establish guilt can only work to the disadvantage of the defendant.

The relevance of the distinction between facially neutral evidentiary changes and one-sided changes lowering the minimum amount of evidence for conviction is buttressed by *Thompson* v. *Missouri*, 171 U.S. 380 (1898). In *Thompson*, state common law at the time of the offense prohibited the use of documents handwritten by the defendant to demonstrate that the handwriting on another document was also that of the defendant. After the alleged offense, Missouri enacted a statute repealing the common law rule and allowing the introduction into evidence of documents in the defendant's handwriting for purposes of comparison with other documents alleged to be in the defendant's handwriting. *Id.* at 381. As

Thompson explained, the change in the law to allow the admission of handwriting samples gave the prosecution and the defense equal right to "have disputed writings compared with writings proved . . . to be genuine." *Id.* at 387-88. The Court held the retroactive application of the statute to the defendant did not violate the Ex Post Facto Clause because the statute merely admitted additional evidence, and "did not require 'less proof, in amount or degree,' than was required at the time of the commission of the crime charged upon him." *Id.* at 387.

Beazell v. *Ohio*, 269 U.S. 167 (1925), where the issue was the retroactive application of a law allowing the joint trial of co-defendants, contains a similar discussion. At the time of the defendants' conduct, Ohio law provided that defendants jointly indicted for a felony were entitled to separate trials. After defendants' conduct, but before their indictment, Ohio changed the law to provide the trial court with discretion to grant or deny a request for separate trials. *Id.* at 169. The trial court denied defendants' motions for separate trials, and defendants were tried and convicted in a single trial. *Id.* The Supreme Court upheld the conviction against an *ex post facto* challenge, holding that retrospective application of the statute allowing joint trials did not substantially disadvantage the defendants, but rather affected "only the manner in which the trial of those jointly accused shall be conducted" and did "not deprive the [defendants] of any defense previously available" to them. *Id.* at 170. Distinguishing the procedural change in *Beazell* from changes that would transgress the requirements of the Ex Post Facto Clause, the Court found that, under the new Ohio statute, *"[t]he quantum and kind of proof required to establish*

guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, *remain the same.*" *Id.* (emphases added).

More recent decisions have also reaffirmed the *Calder* categories. In *Miller* v. *Florida*, 482 U.S. 423 (1987), the Court struck as unconstitutional a statute that had the effect of retroactively disadvantaging a specific class of convicted felons, sex offenders. *Id.* In *Miller*, between the time of the defendant's sexual offense and the time of his conviction, the State of Florida changed the presumptive sentence for that offense from 3½ - 4½ years in prison to 5½ - 7 years in prison. *Id.* at 427. At the outset of the opinion, the Court noted that the meaning of the prohibition against *ex post facto* laws "largely derives from the case of *Calder* v. *Bull*," and listed the four categories of laws that *Calder* established were prohibited by the Ex Post Facto Clause. *Id.* at 429. The Court held that the retroactive change violated the prohibition against retroactive increases in punishment established by *Calder* (third category) and its progeny. *Id.* at 435-36 (citing *Weaver* v. *Graham*, 450 U.S. 24, 36 (1981)).

In *Collins*, the Court upheld a Texas statute that allowed reformation of a judgment to delete a punishment that could not be combined with another. 497 U.S. at 39-40, 52. The amount of evidence necessary for conviction, however, was unaffected by the new statute. Moreover, the Court reaffirmed that the formulations of the proscriptions of the Ex Post Facto Clause set forth in *Calder* remain good law. *Collins* v. *Youngblood*, 497 U.S. 37, 41-42 (citing, *inter alia*, *Cummings* v. *Missouri* dissent's statement that *Calder*'s "exposition of the nature of *ex post facto* laws has never been denied"). *Collins* limited turn-

of-the-century decisions that had suggested the reach of the Ex Post Facto Clause extended beyond the *Calder* categories to prohibit retrospective application of laws that deprived a defendant of "substantial protections," or infringed upon "substantial personal rights." *Id.* at 45-46 (discussing *Duncan* v. *Missouri*, 152 U.S. 377 (1894) and *Malloy* v. *South Carolina*, 237 U.S. 180 (1915)). Finding that the amorphous phrases "substantial personal rights," and "substantial protections" should not be read to expand the reach of the Ex Post Facto Clause beyond the explicit *Calder* formulation, the Court held "*the prohibition which may not be evaded is the one defined by the Calder categories.*" *Id.* at 46 (emphasis added).

II. RETROACTIVE APPLICATION OF THE 1993 AMENDMENT ALSO VIOLATED THE EX POST FACTO CLAUSE BY DEPRIVING PETITIONER OF A DEFENSE AVAILABLE UNDER THE LAW IN EFFECT AT THE TIME OF HIS CONDUCT.

Retroactive application of the 1993 amendment to Petitioner's pre-amendment conduct also violated the Ex Post Facto Clause by depriving him of an absolute defense to Counts 7 – 10 available at the time of that alleged conduct. Laws prohibited by the Ex Post Facto Clause include "any statute . . . which deprives one charged with [a] crime of any defense available at the time when the act was committed." *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925); see *Collins* v. *Youngblood*, 497 U.S. 37, 52 (1990). *Collins* reaffirmed the *Beazell* formulation, stating that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause." 497 U.S. at 43.

Under the law in effect at the time of Petitioner's conduct, he had an absolute and insuperable defense to Counts 7 – 10 of the indictment, because the prosecution produced no corroborating testimony to support the testimony of the complaining witness, nor was there evidence that the complaining witness made a timely "outcry." *E.g.*, *Scoggan* v. *Texas*, 799 S.W.2d 679, 683 (Tex Crim. App. 1990) (applying 1983 version of Article 38.07, holding that absence of corroboration or timely outcry compelled acquittal on sexual assault charge); *Friedel* v. *Texas*, 832 S.W.2d 420, 421 (Tex. App. 1992, no pet.) (same); *Jones* v. *Texas*, 789 S.W.2d 330, 331 (Tex. App. 1990, pet. ref'd) (same); see Tex. Code Crim. Proc. art. 38.07 (1983). This is the kind of defense that cannot be repealed retroactively, because it is a defense on the merits. That is, a two-witness requirement provides a defense "considered by the court . . . in determining guilt or innocence." *Beazell*, 269 U.S. at 170. In particular, a two-witness rule is designed to reduce the risk of erroneous convictions, *i.e.*, convictions that are wrong on the merits. See, *e.g.*, *Scoggan*, 799 S.W.2d at 682; *Ex parte Merrill*, 201 S.W.2d 232, 233-34 (Tex. Crim. App. 1947); see also *Utah* v. *Foust*, 588 P.2d 170, 173 (Utah 1978) ("The real purpose behind the law requiring corroboration . . . is to afford protection to one falsely accused."). Application of the amended 1993 corroboration statute to Petitioner's pre-amendment conduct stripped him of this absolute defense on the merits to Counts 7 – 10.

III. THE 1993 AMENDMENT CHANGED THE SUBSTANTIVE CRIMINAL LAW, AND THUS ITS RETROACTIVE APPLICATION TO PETITIONER VIOLATES THE EX POST FACTO CLAUSE.

The retroactive application of the amended Article 38.07 was a change in the substantive criminal law of Texas. That change allowed Petitioner's conviction on less proof than would have been allowed under the law in effect at the time of his conduct, and deprived him of a defense on the merits requiring acquittal. The Texas Court of Appeals stated, without analysis, that the amendment to Article 38.07 was a procedural change that did not offend the prohibition against *ex post facto* laws. See *Carmell* v. *Texas*, 963 S.W.2d 833, 836 (Tex. App. 1998). Another Texas Court of Appeals, however, has held that "the amended article 38.07 is not merely a procedural change." *Bowers* v. *Texas*, 914 S.W.2d 213, 217 (Tex. App. 1996, pet. ref'd). In any event, the "procedural" label is both irrelevant and wrong.

A. Whether Article 38.07 Is Labeled "Procedural" Is Irrelevant.

Collins reaffirmed that the key to analyzing whether a law offends the Ex Post Facto Clause is not whether it is labeled "substantive" or "procedural," but whether it violates one of the *Calder* categories or *Beazell*. *Collins* v. *Youngblood*, 497 U.S. 37, 46 (1990); *Weaver* v. *Graham*, 450 U.S. 24, 29 n.12 (1981) (retroactive change in law can violate Ex Post Facto Clause "even if the statute takes a seemingly procedural form"). As *Collins* explained,

> [S]imply labeling a law "procedural," . . . does not . . . immunize it from scrutiny under the *Ex Post Facto* Clause. Subtle *ex post facto* violations are no more permissible than overt ones.

Collins, 497 U.S. at 46 (citation omitted).

B. Amended Article 38.07 Affects Substance, And Not Merely Procedure.

In any event, for purposes of interpreting the Ex Post Facto Clause, whether a state law affects substantive matters or merely procedure is a question of federal constitutional law, not state law. See, *e.g.*, *Collins*, 497 U.S. at 45. Amended Article 38.07 clearly affects substantive matters for purposes of the Ex Post Facto Clause because, as demonstrated above, it falls squarely within the fourth category of *Calder* v. *Bull*, and eliminates a defense on the merits.

Moreover, unlike (for example) a provision of the Federal Rules of Evidence, the 1993 amendment to Article 38.07 is not a neutral rule that will sometimes help defendants and sometimes help prosecutors. Nor was it an attempt to produce more efficient courtroom proceedings. Rather, the 1993 amendment was consciously designed to make it easier to convict those accused of sexual offenses against teenagers. See *supra* pp. 17-18, 29-30. Stopping sexual misconduct against teenagers is a vital public purpose – but it is a substantive purpose, not a mere matter of procedure.

A comparison to *Miller* v. *Florida*, 482 U.S. 423 (1987), is instructive. *Miller* rejected Florida's argument that a change in sentencing range was merely a procedural

change, finding that "the sole reason for the increase [in the presumptive sentencing range] was to punish sex offenders more heavily; the amendment was intended to, and did, increase the 'quantum of punishment' for [sex] crimes." *Id.* at 433-34. Similarly, in the present case, the reason for Texas' elimination of the requirement of corroboration was to make it easier to convict persons accused of sex crimes involving teenagers. *Supra* pp. 17-18, 29-30. The 1993 amendment to Article 38.07 was intended to, and did, reduce the State's required quantum of proof by reducing the amount of evidence necessary for a conviction. Just as in *Miller*, the 1993 amendment worked entirely and unambiguously to Petitioner's disadvantage, and had no feature that in any way "could be considered ameliorative" with respect to Petitioner's interests. 482 U.S. at 431-32.

Furthermore, what is substantive for purposes of criminal cases, where the defendant's liberty is at stake, ought to be at least as expansive as what is substantive in a civil tort action in federal court. If a plaintiff had sued a defendant for a tort, and Texas had a statute requiring a corroborating witness for proof of that tort, or some other specified minimum amount of proof, it would be crystal clear that such a rule is substantive, and must be applied in federal court in a diversity or ancillary jurisdiction case under *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Indeed, since *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208 (1939), the Court has held that burden of proof issues are substantive under *Erie*. *Id.* at 212; see *Palmer* v. *Hoffman*, 318 U.S. 109, 117 (1943) ("The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases

must apply.") (internal citation omitted); *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 446 (1959) ("[u]nder the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' ") (footnote omitted); see also *Blair* v. *Manhattan Life Ins. Co.*, 692 F.2d 296, 302 (3d Cir. 1982) (diversity action applying Pennsylvania law to question of whether "testimony from two witnesses or from one witness and corroborating circumstances" was required). At a minimum, it would be anomalous to hold that a Texas two-witness rule *must* be applied by a federal court to avoid "forum-shopping" against a civil defendant, but the same kind of rule can be jettisoned retroactively in a criminal case, and thereby deprive a criminal defendant of an absolute defense on the merits.

CONCLUSION

Petitioner's convictions on Counts 7 – 10 should be reversed, and the remainder of the case remanded for further proceedings consistent with this Court's opinion.

Respectfully Submitted,

RICHARD D. BERNSTEIN*
CARTER G. PHILLIPS
KATHERINE L. ADAMS
PAUL A. HEMMERSBAUGH
BRIAN C. KALT

SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006

September 17, 1999

* *Counsel of Record*

7540 (7)

No. 98-~~7450~~

IN THE

Supreme Court of the United States

SCOTT LESLIE CARMELL,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Texas Court of Appeals

RESPONDENT'S BRIEF ON THE MERITS

JOHN CORNYN
Attorney General of Texas
Counsel of Record
ANDY TAYLOR
First Assistant Attorney General
LINDA S. EADS
Deputy Attorney General for Litigation
GREGORY S. COLEMAN
Solicitor General
PHILIP A. LIONBERGER
Assistant Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700
Counsel for Respondent

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

5 cp

QUESTION PRESENTED

Whether the Ex Post Facto Clause of article I, § 10, of the United States Constitution precluded the application of Texas's amended "outcry statute," codified in article 38.07 of the Texas Code of Criminal Procedure, to Petitioner's prosecution for various sex-related offenses committed against his minor stepdaughter.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS, STATUTES, AND LEGISLATIVE HISTORY

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 98-7450

SCOTT LESLIE CARMELL,
Petitioner,
v.
STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Texas Court of Appeals

RESPONDENT'S BRIEF ON THE MERITS

At issue in this case is whether an amended statute that repeals an evidentiary corroboration requirement may, consistent with the Ex Post Facto Clause, be applied in the trial of a defendant whose criminal acts were committed prior to the amendment.

Petitioner urges an interpretation of the Ex Post Facto Clause that is nearly as cynical as the life he has led. Carmell—a counselor for incest victims who began an intimate relationship with one of his patients, married her, and then initiated an incestuous and sexually abusive relationship with her minor daughter that lasted four years—asserts an interpretation of the Ex Post Facto Clause that has nothng to do with whether his actions were innocent when taken, whether the State attempted to retro-

actively apply a redefined crime, or whether the State attempted to retroactively increase the punishment that could be imposed on him. In short, Carmell's interpretation has nothing to do with the Clause's traditional role of allowing individuals to rely on existing law to structure their actions to avoid committing crimes. Instead, Carmell asserts an interpretaton that would permit him and other criminals to rely on evidentiary loopholes to structure their crimes to avoid conviction and punishment. The Court has previously rejected similar arguments and should do so again in this case.

STATEMENT OF THE CASE

Scott Carmell repeatedly sexually abused his stepdaughter, KM, begnning in the spring of 1991 and ending in early 1995.[1] When the sexual abuse began, KM was 13 years old. The sexual abuse ended only after KM finally confided the facts of the abuse to her mother, and KM's mother reported Carmell to the police. Prior to confiding in her mother, KM did not tell anyone of the sexual abuse Carmell had committed upon her.

Carmell was indicted on eight counts of indecency with a child, two counts of aggravated sexual assault, and five counts of sexual assault. J.A. at 22-104. The convictions at issue here concern counts seven through ten of the indictment, which alleged that the offenses occurred between June 1, 1992, and July 1, 1993, when KM was either 14 or 15 years old. J.A. at 55, 60-62, 66-67, 72-73. At the time that Carmell committed these offenses, Texas's "outcry statute" provided in relevant part:

---

[1] Respondent's "*Statement of the Case*" is based primarily upon the opinion of the court of appeals found in the parties' Joint Appendix beginning at page 3 and reported as *Carmell v. State*, 963 S.W.2d 833 (Tex. App.—Fort Worth 1998, pet. ref'd) (per curiam), *cert. granted*, 119 S.Ct. 2336 (1999).

> "A conviction under Chapter 21, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense." Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91, *amended by* Act of May 10, 1993, 73rd Leg., R.S., ch. 200, § 1, 1993 Tex. Gen. Laws 387, 387-88, *and* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (current version at TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1999)).

Carmell was tried for these offenses in January of 1997. J.A. at 1-2. Between the time that the last of the offenses at issue occurred and the time of Carmell's trial, the Texas Legislature amended the outcry statute, effective September 1, 1993, as follows:

> "A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 18 years of age at the time of the alleged offense." Act of May 10, 1993, 73rd Leg., R.S., ch. 200, § 1, 1993 Tex. Gen. Laws 387, 387-88; Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1999)).

At trial, KM testified about the offenses Carmell committed upon her.[2] The jury found Carmell guilty of all 15 counts of the indictment, and assessed punishment at two concurrent life sentences on the aggravated sexual assault counts and concurrent 20-year sentences on each of the remaining counts. J.A. at 22-104. The 1993 version of the outcry statute was applied in convicting Carmell of the offenses.

Carmell appealed his convictions and asserted numerous points of error. Carmell argued that he should be acquitted of the charges because KM did not tell her mother about the abuse until 1995 and her testimony

[2] KM's testimony was not the only evidence of Carmell's crimes. The prosecution presented other testimony and evidence corroborating KM's testimony and tending to connect Carmell to the charged offenses. Several other witnesses testified to the inappropriate and unusual relationship that existed between Carmell and KM. *See* Statement of Facts, vols. 9 & 10. Indeed, in closing argument, the prosecution reminded the jury that "[t]he other testimony that we introduced was pretty much just what we refer to as *corroborative testimony*, testimony from other people saying that they saw the actions and the interaction between [KM] and [Carmell] and thought it was unusual. They acted more like lovers than they did like father and stepdaughter." S/F, vol. 11, at 383 (emphasis added). Other corroborative evidence was also admitted, including, but not limited to, cards and letters exchanged between Carmell and KM, State's Exhibits nos. 8-19; the horseshoe-nail "wedding" ring Carmell gave to KM at a "ceremony" Carmell staged, S/F, vol. 9, at 136-39, State's Exhibit 4; a photograph of the hand-held massage vibrator Carmell used on KM in connection with the offenses alleged in counts 9 and 10 of the indictment, S/F, vol. 9, at 118-23, State's Exhibit 2; and various herbs, teas, and other concoctions that Carmell insisted KM take in order to regulate her menstrual cycle, S/F, vol. 9, at 142-45; State's Exhibits nos. 5-7. All of this evidence tended to connect Carmell to the alleged offenses. *See Nemecek v. State*, 621 S.W.2d 404, 406-07 (Tex. Crim. App. 1980) (holding that corroborative evidence under article 38.07 is sufficient if it tends to connect defendant with the offense charged), *overruled in part on other grounds, Hernandez v. State*, 651 S.W.2d 746, 754 (Tex. Crim. App. 1983) (per curiam).

was otherwise uncorroborated. J.A. at 7. The court of appeals rejected Carmell's ex post facto argument, holding that "the law in effect at the time of [Carmell's] trial in 1997 applies, which is the [1993 version of the outcry statute]." J.A. at 8. In so holding, the court reasoned that the 1993 version of the outcry statute did "not increase the punishment nor change the elements of the offense that the State must prove[,] . . . [it] merely 'remove[d] existing restrictions upon the competency of certain classes of persons as witnesses' and . . . is . . . a rule of procedure." *Id.* The court further reasoned that there was no showing that "the legislature intended [the 1993 version of the outcry statute] not to be a rule of procedure and apply as of the date of the offense." *Id.* Accordingly, the court held that "because KM was younger than 18 at the time of the offense, the one-year time limit on her outcry [did] not apply." *Id.*[3] Carmell's petition for discretionary review was refused by the Texas Court of Criminal Appeals.

Courts have split on whether the application of a statute abrogating a corroboration requirement that existed at the time the crime was committed violates the Ex Post Facto Clause. *Compare Murphy v. Sowders*, 801 F.2d 205, 209 (CA6 1986), *People v. Hudy*, 73 N.Y.2d 40, 51-54, 535 N.E.2d 250, 256-58 (1988), *Murphy v. Commonwealth*, 652 S.W.2d 69, 73 (Ky. 1983), *Graves v. State*, 994 S.W.2d 238, 242 (Tex. App.—Corpus Christi 1999, pet. ref'd), *Carmell v. State*, 963 S.W.2d 833, 836 (Tex. App.—Fort Worth 1998, pet. ref'd) (per

[3] The court of appeals's opinion did not mention the corroborative testimony and evidence supporting KM's testimony. *See supra* note 2. Because the court held that application of the 1993 amendments to article 38.07 did not violate the Ex Post Facto Clause, it was not necessary for the court to determine whether the record contained corroborative evidence.

curiam), *and Lindquist v. State*, 922 S.W.2d 223, 228 (Tex. App.—Forth Worth 1996, pet. ref'd), *with Virgin Islands v. Civil*, 591 F.2d 255, 259 (CA3 1979), *State v. Schreuder*, 726 P.2d 1215, 1218 (Utah 1986), *State v. Byers*, 627 P.2d 788, 795-96 (Idaho 1981), *and Bowyer v. United States*, 422 A.2d 973, 981 (D.C. 1980).[4] The Court granted Carmell's petition for writ of certiorari on Carmell's ex post facto challenge.

SUMMARY OF THE ARGUMENT

The 1993 version of Texas's outcry statute was properly applied in Carmell's 1997 trial to convict him of four of the fifteen counts against him that occurred between June 1, 1992, and July 1, 1993, prior to the effective date of the act, September 1, 1993. The application of the 1993 outcry statute to convict Carmell of those four counts—one count of sexual assault and three counts of indecency with a child—did not violate the Ex Post Facto Clause contained in article I, § 10, of the United States Constitution. Under the Court's most recent formulation of the test to be applied in determining whether an ex post facto violation occurred, a law offends the Ex Post Facto Clause if it "alter[s] the definition of crimes or increase[s] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). The 1993 amendment of the outcry statute neither altered the definition of the crimes of sexual assault and indecency with a child nor increased the punishment for those crimes. Consequently, the trial court's use of the 1993 version of article 38.07 in Carmell's trial was not an ex post facto violation.

---

4 Fifteen years ago, in a dissent from a denial of a petition for writ of certiorari, Justice White, joined by Justices Brennan and Powell, recognized "the evident confusion among lower courts concerning the application of the Ex Post Facto Clause to changes in rules of evidence and procedure." *Murphy v. Kentucky*, 465 U.S. 1072, 1073 (1984) (mem.) (White, J., dissenting).

The 1993 amendments to the outcry statute do not bring this case within the fourth category of prohibited ex post facto laws set forth in Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). The 1993 statute neither alters the definition of the crimes for which Carmell was convicted nor increases the punishment for those offenses. The amended statute's abrogation of the outcry or corroboration requirements did not diminish the prosecution's burden to prove all of the substantive elements of the offenses charged beyond a reasonable doubt. The same essential facts were required to be established by the evidence at Carmell's trial as were required prior to the abrogation of the corroboration requirement. Nor did the abrogation of the outcry and corroboration requirements deprive Carmell of an "absolute defense." His suggestion that the corroboration requirement constituted a defense ignores this Court's holding in *Collins* that the term "defense" is linked to the Ex Post Facto Clause's prohibition on alterations in the legal definition of the offense or the nature or amount of the punishment imposed for a conviction.

Application of the 1993 outcry statute to convict Carmell did not implicate the core concerns of the Ex Post Facto Clause: vindictive lawmaking, lack of fair warning, and reliance on existing law. There was nothing vindictive about the 1993 amendments; they were intended solely to level the playing field and make some alleged sex offenders subject to the same rules that apply to other criminal defendants. Carmell had fair warning that the heinous acts he perpetrated on KM were punishable under the law and the extent to which those acts could be punished, and he did not and could not have legitimately relied on a procedural rule that affected neither his culpability nor his expected punishment.

ARGUMENT

I. HISTORY AND DEVELOPMENT OF TEXAS'S OUTCRY STATUTE

The requirement of corroboration for the complainant's testimony in sex offense cases did not exist at common law and came about through "either express statutory inventions or plan judicial creations." Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R.4th 120, 124 (1984). Texas originally followed the common-law rule not requiring corroboration of a rape complainant. *See Gonzalez v. State*, 32 Tex. Crim. 611, 620, 25 S.W. 781, 781-82 (1894) (holding that it was not error for the trial court to refuse to instruct the jury that in the absence of direct evidence corroborating the prosecutrix, they should acquit the defendant of rape). However, late in the 1800s and early this century, Texas courts moved away from the common-law rule and began requiring corroboration of a victim's testimony in rape cases in which the victim had the opportunity to complain of the rape to someone but remained silent without cogent reasons explaining her silence. *E.g., Gray v. State*, 130 Tex. Crim. 289, 293, 93 S.W.2d 1146, 1148 (1936); *Davis v. State*, 100 Tex. Crim. 617, 624, 272 S.W. 480, 483 (1925); *Price v. State*, 36 Tex. Crim. 143, 145, 35 S.W. 988, 988 (1896). The outcry and corroboration requirements, however, applied only to rape cases in which consent was an issue. *Hindman v. State*, 152 Tex. Crim. 75, 80, 211 S.W.2d 182, 185 (1948). In cases of statutory rape, consent was not an issue, and the victim's testimony did not need to be corroborated even though the victim did not make an immediate outcry when there was a reasonable opportunity to do so.

Id.; *see also Hernandez v. State*, 651 S.W.2d 746, 752-53 (Tex. Crim. App. 1983) (Clinton, J., concurring).[5]

The 1960s and 1970s saw dramatic increases in reported rapes and increased public awareness of the plight of rape victims across the United States, and a movement emerged to reform states' rape laws. *See* Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Reforms*, 39 JURIMETRICS J. 119, 120-21 (1999); Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. LEGIS. 125, 128 (1998); *Sarah Weddington, Rape Law in Texas: H.B. 284 and the Road to Reform*, 4 AM. J. CRIM. L. I, 1-3 (Wint. 1975-76). In 1975, Texas state representatives Kay Bailey of Houston and Sarah Weddington of Austin co-sponsored a bill in the Texas Legislature that sought to reform Texas's rape laws by focusing on the aspects of the law that they believed to be "the source of the greatest injustice—those that tended to put the victim on trial." Weddington, *Texas Rape Law*, at 4, 6. One of the proposed changes in the Bailey-Weddington bill concerned the abolition of the judicially created outcry or corroboration requirements in rape cases. *Id.*, at 5, 10.

The full legislature, however, felt that the bill went too far, *see Scoggan v. State*, 799 S.W.2d 679, 682 (Tex. Crim. App. 1990), and the final version of the bill did

---

[5] From the latter part of the 1800s up until the early 1970s, Texas's only statutory corroboration requirement for sex offenses concerned the crime of "seduction" of a female, which was repealed in 1974, leaving only the judicially created outcry or corroboration requirements in cases of rape. *See* Act of 22nd Leg., R.S., ch. 33, § 1, 1891 Tex. Gen. Laws 34, 34-35, *reprinted in* H.P.N. GAMMEL, LAWS OF TEXAS 36, 36-37 (1898), *repealed by* Act of May 24, 1973, 63rd Leg., ch. 399, § 3(b), 1973 Tex. Gen. Laws 883, 991, 995; *Hernandez*, 651 S.W.2d, at 752.

not abolish the common-law requirement of an immediate outcry but, rather, only eased the outcry or corroboration requirements by sustaining convictions based upon the uncorroborated testimony of the victim if the victim confided in anyone else besides the defendant within six months of the offense. Act of May 8, 1975, 64th Leg., R.S., ch. 203, § 6, 1975 Tex. Gen. Laws 476, 479, *amended by* Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91, *and* Act of May 10, 1993, 73rd Leg., R.S., ch. 200, § 1, 1993 Tex. Gen. Laws 387, 387-88, *and* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (current version codified at TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1999)). Consistent with the common law, the original statute did not create any outcry or corroboration requirement in cases involving minor victims of sex crimes.[6] *Id.* A conviction for statutory rape could still be sustained in Texas on the uncorroborated testimony of the minor victim, even if the victim did not make a timely outcry. *See, e.g., Hernandez v. State*, 651 S.W.2d 746, 754 (Tex. Crim. App. 1983) (per curiam); *Waldrop v. State*, 662 S.W.2d 612, 614 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd).

---

[6] In Texas, as in other states, only the legislature has authority to define crimes or set punishments. *See Matchett v. State*, 941 S.W.2d 922, 932 (Tex. Crim. App. 1996) (en banc) ("The legislature is vested with the lawmaking power of the people in that it alone 'may define crimes and prescribe penalties.'" (quoting *State ex rel. Smith v. Blackwell*, 500 S.W.2d 97, 104 (Tex. Crim. App. 1973))). The fact that Texas's corroboration requirements originally arose as part of a common-law development is strong evidence that the legislature's codification and subsequent modification of the corroboration requirements did not involve the definition of a crime or its punishment—as required by *Collins*—and, consequently, could not have implicated the Ex Post Facto Clause.

In 1983, the legislature amended article 38.07 of the Texas Code of Criminal Procedure and changed the outcry or corroboration requirements for minor victims of sexual assault. *See* Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91 (amended 1993). The 1983 amendment to article 38.07 shielded sexual assault victims under the age of 14 from the normal outcry or corroboration requirements but not victims 14 or older. *Id.*; *see Scoggan v. State*, 799 S.W.2d 679, 683 (Tex. Crim. App. 1990); *Friedel v. State*, 832 S.W.2d 420, 422 (Tex. App.—Austin 1992, no pet.); *Jones v. State*, 789 S.W.2d 330, 333 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd). The 1983 amendment applied only to prosecutions commencing on or after the effective date of the act, and prosecutions commencing before that time were to be covered by the law in effect at the time the prosecution was commenced. Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 2, 1983 Tex. Gen. Laws 2090, 2091 (amended 1993).

The 1983 version of the outcry statute was sharply criticized for drawing a "bewildering and inappropriate" distinction between victims under the age of 14 and those over that age, and courts decried the distinction as being "arbitrary and purposeless." *Jones*, 789 S.W.2d, at 333; *accord Friedel*, 832 S.W.2d, at 422. Notwithstanding that criticism, the 1983 version of the outcry statute remained in place until 1993 when it was finally amended. Act of May 10, 1993, 73rd Leg., R.S., ch. 200, § 1, 1993 Tex. Gen. Laws 387, 387-88; Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1999)). The 1993 version of the outcry statute lengthened the outcry period from six months to one year and abolished the outcry requirements for persons under the age of 18. TEX. CODE

CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1999). Conspicuously absent from the 1993 version of the outcry statute was a provision, like the one in the 1983 version, providing that it would apply only to prosecutions commencing after the statute's effective date. The legislature's omission of that language in the 1993 statute evidenced its intent that the amended statute be applied in all pending prosecutions tried after the effective date. *See Lindquist v. State*, 922 S.W.2d 223, 227 n.4 (Tex. App.—Austin 1996, pet. ref'd) (noting that the legislature purposefully intended to omit such language).[7]

Carmell claims that application of the amended statute to convict him of one count of sexual assault and three counts of indecency with a child, all of which occurred prior to September 1, 1993 (the effective date of the amended enactment), violated the Ex Post Facto Clause applicable to the states. For the reasons that follow, the Court should reject Carmell's interpretation of the Ex Post Facto Clause and affirm Carmell's conviction.

---

[7] The Texas courts of appeals split, three-to-one, over whether the 1993 version of the outcry statute could be applied to prosecutions commencing after the effective date of the act for offenses that occurred before the effective date of the act. *Compare Graves v. State*, 994 S.W.2d 238, 241 (Tex. App.—Corpus Christi 1999, pet. ref'd) (holding that application of 1993 outcry statute in a trial occurring after 1993 for offenses occurring before the effective date of the act was proper and did not constitute a violation of the Ex Post Facto Clause), *Carmell v. State*, 963 S.W.2d 833, 836 (Tex. App.—Fort Worth 1998, pet. ref'd) (per curiam) (same), *and Lindquist*, 922 S.W.2d, at 223 (same), *with Bowers v. State*, 914 S.W.2d 213, 216-17 (Tex. App.—El Paso 1996, pet. ref'd) (holding that application of 1993 outcry statute in a trial occurring after 1993 for offenses occurring before the effective date of the act constituted a violation of the Ex Post Facto Clause).

II. APPLICATION OF THE 1993 AMENDMENTS TO CARMELL'S TRIAL DID NOT VIOLATE THE EX POST FACTO CLAUSE BECAUSE THEY DID NOT RETROACTIVELY ALTER THE DEFINITION OF THE CRIMES OR INCREASE THE PUNISHMENT FOR THE CRIMES.

The Constitution prohibits state legislatures from enacting ex post facto laws. *See* U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . ex post facto law). Literally, any law can be ex post facto if it is passed "after the fact, or thing done, or action committed." *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.); *see also* William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539, 539 (1947) (a law ex post facto is simply "a law made after the doing of the thing to which it relates, and retroacting upon it"). In the seminal case of *Calder v. Bull*, the Court narrowed the meaning of the clause by holding that it applied only to retroactive penal legislation, and not to civil statutes. 3 U.S. (3 Dall.), at 390-92 (Chase, J.); *id.*, at 396-97 (Paterson, J.); *id.*, at 399-400 (Iredell, J.). In *Calder*, Justice Chase categorized various laws that he considered to be prohibited by the clause:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender." *Id.*, at 390.

Carmell argues that the 1993 outcry statute as applied to him constituted an ex post facto violation as described by Justice Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), and subsequent cases of this Court interpreting *Calder*. *See* Pet. Br. 14-34. Specifically, Carmell asserts that his case fits within Justice Chase's fourth category of ex post facto laws. *Calder*, 3 U.S. (3 Dall.), at 390.

Although Carmell would have the Court believe that it is writing on a clean slate in interpreting Justice Chase's fourth category of ex post facto laws, the Court has taken the opportunity on more than one previous occasion to translate Justice Chase's list of illustrative violations into a comprehensive and generally applicable statement of ex post facto doctrine. For instance, nearly three-quarters of a century ago, the Court summarized Justice Chase's categories as follows:

> "[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925).

More recently, the Court succinctly restated the *Beazell* formulation as a concise two-part test: "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins*, 497 U.S., at 43. In other words, an individual should not be punished for conduct that was innocent when done or punished more severely than would have been permissible at the time of the crime. The *Collins* two-part formulation for ex post facto violations has been reaffirmed on at least two occasions since it was decided. ***See Lynce v. Mathis***,

519 U.S. 433, 441 (1997); *California Dep't of Corrections v. Morales*, 514 U.S. 499, 505-06 (1995).

Under the *Collins* formulation, this is a straightforward case. Carmell's sexual abuse of KM was criminal under the Texas Penal Code at the time of the abuse. His acts constituted sexual assault and indecency with a child irrespective of the 1993 amendments, and the partial abrogation of the corroboration requirement did not change the fact that Carmell's conduct constituted an indictable offense. Carmell was not convicted of acts that were innocent when he committed them and that were only made criminal after the fact. They were criminal when he committed them.

The 1993 outcry statute did not alter the definition of the crimes for which Carmell was convicted. Both before and after the 1993 amendments to the outcry statute, the Texas Penal Code defined sexual assault as follows:

> "A person commits an offense if the person . . . intentionally or knowingly . . . causes the penetration of the anus or female sexual organ of a child by any means; . . . causes the penetration of the mouth of a child by the sexual organ of the actor; . . . causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or . . . causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor. . . . 'Child' means a person younger than 17 years of age who is not the spouse of the actor." TEX. PEN. CODE ANN. § 22.011(a)(2)(A)-(D), (c)(1) (Vernon 1994).

Similarly, the crime of indecency with a child was defined as follows:

> "A person commits an offense if, with a child younger than 17 years and not his spouse, whether

the child is of the same or opposite sex, he . . . engages in sexual contact with the child. . . ." *Id.* § 21.11(a).

The 1993 amendments' abrogation of the corroboration requirement for victims between 14 and 18 years of age did not alter the definition of sexual assault or indecency with a child or change any of the substantive elements of those crimes. At trial, the prosecution was still required to prove every element of both crimes beyond a reasonable doubt. *See* Tr. at 75-77.[8]

The 1993 outcry statute did not increase the punishment for sexual assault and indecency with a child. These crimes were both second-degree felonies at the time Carmell committed them. TEX. PEN. CODE ANN. §§ 21.11(c), 22.011(f). Second-degree felonies carried a punishment of imprisonment for a term of not more than 20 years nor less than two years and a fine not to exceed $10,000. *Id.* § 12.33. The punishment for second-degree felonies was unaltered by the 1993 outcry statute. The severity of Carmell's punishment was the same after enactment of the 1993 outcry statute as it was before the statute's enactment.

Because Carmell's sexual abuse of KM was not innocent when committed, and because the 1993 outcry statute neither changed the definition of the crimes for which Carmell was being tried nor increased the punishment applicable to those crimes, application of the 1993 outcry statute to Carmell's criminal trial did not violate the Ex Post Facto Clause.

---

[8] The trial court properly instructed the jury on the elements of both offenses. Tr. at 68, 69, 70.

III. APPLICATION OF THE 1993 AMENDMENTS TO CARMELL'S TRIAL DID NOT VIOLATE THE EX POST FACTO CLAUSE BECAUSE *CALDER*'S FOURTH CATEGORY DOES NOT HAVE MEANING INDEPENDENT OF THE *COLLINS* FORMULATION.

Carmell does not, and cannot, argue that there was anything innocent about his four-year incestuous molestation of his stepdaughter. Instead, he argues the existence of an evidentiary loophole at the time he was sexually abusing KM that would have permitted him to escape conviction on counts seven through ten of the indictment. He argues that since there was no corroborating evidence,[9] thus making KM's testimony insufficient under article 38.07 to convict him, the Ex Post Facto Clause gave him an enforceable reliance interest in the application of that evidentiary loophole to any conduct that occurred while the loophole existed. In other words, Carmell argues that the Ex Post Facto Clause protects a criminal's ability to canvas existing evidentiary law in order to structure his criminal activities so as to minimize the risk of conviction and that it guarantees that the legislature cannot later interfere with the criminal's evidentiary advantage.

This Court's holdings in recent (and not-so-recent) ex post facto cases do not support Carmell's contentions. In the face of his inability to satisfy the *Collins* standard, Carmell has searched the fringes of ex post facto doctrine for support for his contention that the 1993 elimination of the corroboration requirement improperly "reduce[d] the amount of evidence and number of witnesses required for conviction," Pet. Br. 24, "work[ed] to . . . [his]

---

[9] Again, Texas believes there was sufficient corroborating evidence to support the conviction. *See supra* note 2.

disadvantage," *id.*, at 26, and changed the amount and kind of proof required to establish his guilt, *id.*, at 27.

A. Article 38.07's Corroboration Requirement Does Not Affect the Quantity or Degree of Proof Necessary to Convict and Is Not a Two-Witness Rule.

As a preliminary matter, Carmell repeatedly attempts to bolster his case somehow by mistakenly asserting that the 1983 outcry statute imposed a two-witness rule requiring the testimony of a second eyewitness to the offense in order to sustain a conviction, even though the language of the statute makes no mention of a two-witness rule and speaks in terms of corroboration only. *See* Pet. Br. 5-6 & n.5, 7, 16, 30, 34. Surprisingly, Carmell seems to take the indefensible position that he could never be convicted of sexual assault or indecency with a child unless the prosecution was able to produce a third-party eyewitness to his acts of improper intimacy with KM.

Rules requiring corroboration are generally concerned with the sufficiency of evidence—that is, whether the testimony of a single witness is sufficiently credible to support a conviction and, if not, what other evidence will support the witness's testimony. 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2030, at 324 (James H. Chadbourn rev. 1978). Contrary to Carmell's assertions, the corroborative evidence required by article 38.07 could be any evidence that tended to connect him to the crime. *Nemecek v. State*, 621 S.W.2d 404, 406 (Tex. Crim. App. 1980), *overruled in part on other grounds, Hernandez v. State*, 651 S.W.2d 746, 754 (Tex. Crim. App. 1983) (per curiam); *see also Scoggan v. State*, 799 S.W.2d 679, 681 n.5 (Tex. Crim. App. 1990) (noting that *Nemecek* states the standard for corroboration

under article 38.07).[10] Corroborating evidence need not be more or different from the victim's testimony; it may be entirely cumulative of the victim's testimony or it may be physical evidence that supports the victim's testimony. Corroborating evidence may be entirely circumstantial, *Zule v. State*, 802 S.W.2d 28, 32 (Tex. App.—Corpus Christi 1990, pet. ref'd), may consist of "suspicious circumstances," *Burks v. State*, 876 S.W.2d 877, 888 (Tex. Crim. App. 1994), and need not independently establish any of the elements of the crime. The corroboration requirement is not intended to provide independent proof necessary to convict an individual of a crime; rather, it is intended merely to force the prosecution to provide evidence corroborating the victim's version of events and, as a result, bolstering the testifying victim's credibility. In short, eyewitness testimony is not required to satisfy the statute's corroboration requirement. *Zule* 802 S.W.2d, at 32.

---

[10] Cases occurring before enactment of the outcry statute in 1975 also did not require eyewitness testimony from persons other than the victim or the accused in order to sustain a conviction of rape or statutory rape. *See, e.g., Bass v. State*, 468 S.W.2d 465, 466-67 (Tex. Crim. App. 1971) (mother's testimony as to victim's appearance and testimony of examining physician held to be "sufficient corroboration of prosecutrix' testimony" and sufficient to sustain a conviction for statutory rape); *Johnson v. State*, 449 S.W.2d 65, 68 (Tex. Crim. App. 1970) (victim's testimony and testimony of police officer as to witness's appearance and condition shortly after the offense was held to be sufficient evidence to support conviction for statutory rape); *Lacy v. State*, 412 S.W.2d 56, 56-57 (Tex. Crim. App. 1967) (victim's testimony and medical records held to be sufficient evidence to show victim had only one act of sexual intercourse and to support conviction of statutory rape); *Purifoy v. State*, 163 Tex. Crim. 488, 491, 293 S.W.2d 663, 664-65 (1956) (medical testimony and witness's testimony of overhearing accused threatening victim held to be sufficient evidence to support conviction of statutory rape); *Gonzales v. State*, 32 Tex. Crim. 611, 620, 25 S.W. 781, 782 (1894) (medical testimony held to be sufficient evidence to sustain conviction for rape).

The cases Carmell cites in support of his two-witness rule argument—*Shelby v. State*, 800 S.W.2d 584, 586 (Tex. App.—Houston [14th Dist.]), *rev'd on other grounds*, 819 S.W.2d 478 (Tex. Crim. App. 1990); and *Heckathorne v. State*, 697 S.W.2d 8, 12 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd)—are distinguishable. First, *Heckathorne* does not hold that eyewitness testimony is necessary to corroborate a victim's testimony; rather, in *Heckathorne*, the defendant argued that Texas's outcry statute did not apply to his case (because the victim was younger than 14) and that, therefore, the statute could not be used to authorize the admission of the victim's outcry statements against the defendant. The court rejected the defendant's argument and held that the outcry statements were admissible because there had been no eyewitness to the offense. 697 S.W.2d, at 12. The court did *not* hold that third-party eyewitness testimony was necessary to corroborate a victim's testimony. *Id. Shelby* merely cites to and relies on *Heckathorne*.

In addition, the two-witness rule derives from an unrelated legal phenomenon—the "rule of number"—that has its origins in Roman law and the medieval ecclesiastical notion that the mere recitation of an oath, by itself, rendered one's testimony effective, regardless of the witness's personal credibility, and that the probative value of testimony would be increased if others testifying to the same facts swore an oath, too. *People v. Hudy*, 73 N.Y. 2d 40, 53 & n.8, 535 N.E.2d 250, 257 & n.8 (1988); *see also* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 203 (3d ed. 1944); Irving Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 40 FORDHAM L. REV. 263, 263-64 (1971); John H. Wigmore, *Required Numbers of Witnesses: A Brief History of the Numerical System in England*, 15

HARV. L. REV. 83, 85 (1901). Treason and perjury are two offenses that derive from the rule of number and that often require two witnesses. Wigmore, *Required Numbers of Witnesses*, at 99. Texas has a two-witness rule for both those offenses. TEX. CODE CRIM. PROC. ANN. art 38.15 (Vernon 1979) ("No person can be convicted of treason except upon the testimony of at least two witnesses to the same overt act, or upon his own confession in open court."); *see also* art. 38.18(a) ("No person may be convicted of perjury or aggravated perjury if proof that his statement is false rests solely upon the testimony of one witness other than the defendant."). The outcry statute in article 38.07 is not a two-witness rule because it did not derive from the rule of number, and if the Texas Legislature had wanted to impose a two-witness rule in the outcry statute it would have expressly done so.

B. Carmell's Expansive Interpretation of Category Four Was Rejected in *Hopt*, and the Court Has Consistently Recognized *Hopt*'s Clarification of the *Calder* Categories.

In *Collins*, the Court declared that Justice Chase's fourth category in *Calder* "was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." *Id.*, at 43 n.3 (citing *Thompson v. Missouri*, 171 U.S. 380 (1898); *Hopt v. Utah*, 110 U.S. 574 (1884)).[11] *Collins* expressly recognizes that the Court rejected Carmell's expansive interpretation of *Calder*'s fourth category more than a century ago. *Id.* In *Hopt*, a law prohibiting testimony from convicted felons was changed, and the defendant was convicted of murder after a felon testified against

---

11 Carmell fails to acknowledge, much less explain, the Court's broad statement in *Collins* that *Calder* does not bar the application of new evidentiary rules.

him. The Court rejected the ex post facto challenge because "[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute." 110 U.S., at 589-90. The Court further stated that "[a]ny statutory alteration of the legal rules of evidence which . . . only removes existing restrictions upon the competency of certain classes of witnesses, relate to modes of procedure only" and "are not ex post facto in their application to prosecution for crimes committed prior to their passage." *Id.*, at 590.

The Court reiterated its concern about retroactive reductions in the required quantum of proof that was first expressed in Justice Chase's fourth category in *Calder*: "Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon ex post facto laws." *Id.* Although the Court has acknowledged that language in rejecting an ex post facto challenge to an evidentiary rule change, *see, e.g., Thompson v. Missouri*, 171 U.S. 380 (1898),[12] the Court has never applied that language in *Hopt* to invalidate the application of a change in an evidentiary rule. In any event, the Court in *Hopt*

---

12 In *Thompson*, the Missouri Supreme Court reversed Thompson's conviction of murder because of the inadmissibility of certain evidence. Letters written by the defendant to his wife were submitted for handwriting comparison, which was prohibited by the rules of evidence. Prior to the second trial, the law was changed to make this objectionable evidence admissible and the defendant was convicted. The Court rejected the argument that this change violated the Ex Post Facto Clause and held that the change was procedural. 171 U.S., at 293.

clarified that its reference to the "quantity or degree of proof" referred not to evidentiary issues of proof at trial, but rather to "proof" in the sense of how the crime is defined and how the constitutional burden of proving the crime is allocated. *Hopt*, 110 U.S., at 590 ("[A]lterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt . . . relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.").

Beazell and *Collins* marked a retreat from certain earlier decisions that attempted to broaden the categories of impermissible ex post facto laws enunciated in *Calder*. The Court clarified that its scrutiny of laws alleged to violate the Ex Post Facto Clause is limited to determining whether legislatures have "retroactively alter[ed] the definition of crimes or increase[d] the punishment for criminal acts." The Court folded the fourth category in Justice Chase's list into the *Collins* two-part formulation and implicitly declared that only those changes in evidentiary rules that alter the definition of the crime or increase the punishment for criminal acts will violate the Ex Post Facto Clause. In other words, although Carmell asserts that "later decisions by this Court explicitly reaffirm the continuing vitality of the fourth *Calder* category," Pet. Br. 21, *Collins* makes clear that the fourth category, or what is left of it, cannot bear the burden that Carmell attempts to force it to carry.

The Court has only twice invalidated an evidentiary change under the ex post facto prohibition—*Kring v. Missouri*, 107 U.S. 221 (1883), and *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866). The Court overruled *Kring* in *Collins*. *See infra* Part III.C. In *Cummings*

v. Missouri, the Court invalidated a provision of the Missouri constitution declaring persons incapable of holding offices of public trust unless they first swore an oath that they had never "been in armed hostility to the United States," and that they had never expressed sympathy for the enemies of the United States. 71 U.S. (4 Wall.), at 316-17. Justice Field, writing for the Court, noted that Missouri's test oath

> "subvert[ed] the presumptions of innocence, and alter[ed] the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the conscience of the parties." *Id.*, at 328.

Cummings reflected the Court's understanding that altering "the rules of evidence" meant to place the burden of proof on the accused and to force him to show his innocence by taking an oath. In others words, the law challenged in *Cummings* violated the Ex Post Facto Clause not because it changed evidentiary rules, but because it shifted the constitutional burden of proof and infringed on the presumption of innocence:

> "The Clauses in the Missouri constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the constitution were not such the fact." *Id.*, at 327.

The test oath violated the Ex Post Facto Clause because, consistent with *Collins*, it in effect retroactively defined a crime and declared a punishment against individuals who could not make the oath. The test oath in *Cummings* is notably different from the corroboration requirement in this case because the 1993 amendments did not shift the constitutional burden or modify any element of the crimes that Carmell committed.

Carmell's attempt to distinguish *Hopt* on the basis that article 38.07's corroboration requirement is not a "witness competency rule[]," Pet. Br. 24-25, fails because, although the statutes took a different form, the same policy animated both. The law in *Hopt* declaring convicted felons to be incompetent to testify in criminal proceedings derived from a common-law rule originating in England in the 1600s that proclaimed a person who had been convicted of an infamous crime—that is, a crime involving treason, a felony, dishonesty, or false statement (crimen falsi)—to be incompetent as a witness. 1 McCormick on Evidence § 42 (John William Strong ed., 4th ed. 1992); 3 Jack B. Weinstein, Margaret A. Berger, & Joseph M. McLaughlin, Weinstein's Evidence ¶ 609 [02], at 609-27 (1996); 2 John Henry Wigmore, Evidence in Trials at Common Law § 519, at 725-27 (James H. Chadbourn rev. 1979); Irwin R. Miller, Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. Cin. L. Rev. 168, 169 (1968). The underlying premise of this rule was that a person who committed such infamous crimes was "unworthy of belief" and "could not be trusted." McCormick on Evidence § 42; Weinstein's Evidence ¶ 609[02], at 609-27; *see also* Wigmore § 519, at 726 ("The thought underlying this exclusion is plain

enough nowadays; the man who has been guilty of a heinous crime cannot be trusted in any respect, therefore, cannot be trusted in his testimony.").[13]

The outcry or corroboration requirements imposed by the Texas outcry statute beginning in 1975 and pre-1975 Texas case law were based on the same principle: absent a timely outcry, a sex crime victim's uncorroborated testimony is inherently untrustworthy, unreliable, and less credible than the testimony of other crime victims. *See Villareal v. State*, 511 S.W.2d 500, 502 (Tex. Crim. App. 1974) (stating that "[t]he basis of this rule is that the failure to make an outcry or promptly report the rape diminishes the credibility of the prosecutrix"); *Hindman v. State*, 152 Tex. Crim. 75, 80, 211 S.W.2d 182, 185 (1948) (same); *Ex parte Merrill*, 150 Tex. Crim. 365, 367, 201 S.W.2d 232, 234 (1947) (same); *Topolanck v. State*, 40 Tex. 160, 1874 WL 7921, at *2 (1874) (same); *see also* 42 GEORGE E. DIX & ROBERT O. DAWSON, CRIMINAL PRACTICE AND PROCEDURE § 31.241, at 301 (1995) (Texas Practice); Irving Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 40 FORDHAM L. REV. 263, 264 (1971).[14] Like the law in *Hopt*, the Texas outcry

[13] Although this disqualification began disappearing from Anglo-American law in the last century, WIGMORE § 519, at 726, and today a person with a prior conviction for an infamous crime can now testify, the credibility of such an individual is subject to attack through the introduction of his prior convictions into evidence. Miller, Note, *Prior Conviction Evidence*, at 169.

[14] The oft-quoted statement of Lord Chief Justice Hale reflects the classic perception of this rule: "It is one thing whether a witness be admissible to be heard; another thing, whether they are to be believed when heard. It is true, rape is a most detestable crime, and therefore ought to be severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder

statute was an evidentiary safeguard intended to ensure that only trustworthy or reliable testimony would be used to support a conviction.

When the legislature in 1993 reinstated the pre-1975 common-law rule, it merely removed the stigma of unreliability attached to a teenaged victim's testimony in a sexual offense case, a modest evidentiary adjustment compared to *Hopt*. Indeed, the 1993 amendments to article 38.07 were far less unfavorable to criminal defendants than the change in *Hopt*. After the change in both instances, the prosecution could rely in whole or part on the testimony of a felon witness or sex crime victim, respectively. But prior to the repeal of the Utah law at issue in *Hopt*, the prosecution was barred from relying on the testimony of a convicted felon and, therefore, in order to obtain a conviction, the prosecution had to satisfy its entire burden of proving each element of the crime beyond a reasonable doubt from evidence other than a felon witness.

By contrast, the 1983 outcry statute merely declared that, if the victim did not make an outcry within six months, then the prosecution was required to introduce some evidence corroborative of the victim's testimony. Unlike the Utah rule, which required the prosecution to prove its entire case without reference to the felon's testimony, the 1983 outcry statute required only slight corroborative evidence to vouch for the victim's credibility. Although the statute required some corroboration, it did not dictate what that evidence would have to be, did not redefine any of the elements of the crime, and did not even require that the corroborating evidence satisfy any of the elements of the crime. If *Hopt* was not an ex post

to be defended by the party accused, tho never so innocent." Younger, *Corroboration in Sex Offenses*, at 264 n.7 (quoting 1680 Pleas of the Crown I, at 635).

facto violation, then the application of the 1993 amendments to Carmell's trial could not have been, either.[15]

Other courts, too, have correctly recognized that modification of a statutory corroboration requirement does not implicate the Ex Post Facto Clause. In thoughtful analyses, both the Sixth Circuit and the New York Court of Appeals, have determined that the repeal of a corroboration requirement will not implicate the ex post facto prohibition. In *Murphy v. Sowders*, 801 F.2d 205, 209 (CA6 1986), the Sixth Circuit held that the repeal of a Kentucky law requiring an accomplice witness's testimony to be corroborated by other evidence in order to support a conviction against the accused did not violate the Ex Post Facto Clause.

> "Applying the teachings of the Supreme Court in *Hopt*, it would appear that the repeal of [the accomplice witness corroboration requirement] did not (1)

[15] Carmell also attempts to distinguish *Hopt* on the grounds that the change in the Utah law was facially neutral, while the 1993 modification of article 38.07 "will always and invariably work to the disadvantage of the defendant," Pet. Br. 26, and "was consciously designed to make it easier to convict those accused of sexual offenses against teenagers" [*i.e.*, vindictive lawmaking], *id.*, at 32. The Court has never required neutrality; to the contrary, the Court in *Collins* expressly rejected the proposition that an ex post facto challenge may be premised on the claim that the evidentiary or procedural change works to the defendant's disadvantage. *See infra* Part III.C. When a state has created obstacles that make the prosecution of a particular crime more difficult, the Ex Post Facto Clause does not prevent the state from lifting those obstacles—as long as the state does not redefine the elements of the crime or increase the punishment. There is no evidence in this case of the sort of legislative abuse contemplated by the framers and the Court's ex post facto jurisprudence. It simply does not follow from the legislature's removal of an arbitrary and purposeless corroboration requirement imposed on underage victims of sex crimes that the legislature vindictively sought to exact some measure of retribution against sex offenders. *See infra* Part IV.

> attach criminality to any act previously committed; (2) aggravate any crime theretofore committed; (3) provide greater punishment than was prescribed at the time of the commission of the crime; or (4) alter the degree or lessen the amount or measure of the proof necessary to sustain a conviction when the crime was committed. . . . A corroboration requirement clearly did not occupy the status of an element of the crime nor did its elimination alter the reasonable doubt standard which traditionally protected criminal defendants. The same essential facts were required to be established by the evidence at Murphy's trial as were required to be proven prior to the repeal of [the corroboration requirement] to convict him of the crime of murder. Accordingly, the dictates of the Supreme Court in *Hopt* suggest a conclusion that the legislative enactment that repealed [the corroboration requirement] did not constitute an ex post facto act as applied to Murphy." *Id.*

Murphy rejected the defendant's reliance on *Hopt* to contend that the repeal of the corroboration requirement violated the Ex Post Facto Clause because it permitted his conviction on a lesser "amount" or "degree of proof." *Id.* The court stated instead that *Hopt* contrasted laws that retroactively change the elements of a crime or burden of proving those elements, which violate the Ex Post Facto Clause, with laws that merely alter the procedure at trial, which do not. *Hopt*'s "reference to the degree or amount of 'proof' in the initial sentence obviously referred to the burden of proof by which the government must prove its case, not proof of evidentiary facts which could have been placed before a jury." *Id.* The court concluded that the Court in *Hopt* was "drawing a sharp distinction between the burden of proof by which the prosecution was required to prove its case and the manner

in which a state by evidentiary rules might permit a prosecutor to do so." *Id.* at 209-10.

The Sixth Circuit refused to interpret *Hopt*'s reference to "proof" as synonymous with "evidence." *Id.* Instead, the court concluded that *Hopt*'s discussion of the amount of proof refers not to any particular evidence or evidentiary rule, but to "the degree of proof that is required in each criminal action to convince a factfinder of the guilt of the accused beyond a reasonable doubt." *See id.*, at 210-11 (citing and quoting *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *In re Winship*, 397 U.S. 358, 364 (1970)).

Similarly, the New York Court of Appeals in *People v. Hudy*, 73 N.Y.2d 40, 535 N.E.2d 250 (1988), held that a New York law that repealed statutory provisions requiring corroboration of the victim's testimony in certain sex-crime prosecutions involving underage victims did not violate the Ex Post Facto Clause. *Id.*, at 44, 535 N.E.2d, at 252. Like *Murphy*, the court concluded that *Hopt*'s "reference to the quantum of proof . . . ha[d] no application to the repealing legislation at issue here" because that reference "principally concerned retrospective reductions in the People's burden of proof." *Id.*, at 51-52, 535 N.E.2d, at 256-57.

Murphy and *Hudy* persuasively demonstrate that Justice Chase's fourth category in *Calder* does not invalidate the application of new evidentiary rules, including modified or repealed corroboration requirements, unless they alter the elements that must be shown to convince a trier of fact beyond a reasonable doubt that the crime has been committed. Because the 1993 amendments to article 38.07 left unchanged both the definition of the crimes of sexual assault and indecency with a child as well as the punishment declared for those crimes, the district court

properly applied the amended statute in Carmell's trial, and he was properly convicted.

C. *Collins* Specifically Rejects Carmell's Assertion that Evidentiary or Procedural Changes that Disadvantage a Defendant Violate the Ex Post Facto Clause.

To avoid the Court's comprehensive expression of the ex post facto doctrine in *Collins* and other cases, Carmell encourages the Court to ignore its recent formulations in favor of a strained and unsupported interpretation of Justice Chase's fourth category of ex post facto laws that was rejected more than 100 years ago. In the aftermath of the Civil War, the courts found themselves faced with a variety of statutes that placed criminal defendants at a disadvantage. Although Justice Chase's oft-quoted categories had once been regarded as the "exclusive definition of ex post facto laws," *Collins*, 497 U.S., at 42, some of the post-Civil War cases of the Court seemed to broaden the list.

In *Kring v. Missouri*, 107 U.S. 221 (1883), the Court first departed from Justice Chase's categories and stated that *Calder* should not be understood to have presented an exclusive list of "all the cases to which the constitutional provision would be applicable." *Id.*, at 228. The Court altered the scope of ex post facto scrutiny by including any law that, " 'in relation to the offence or its consequences, alters the situation of a party to his disadvantage.' " *Id.*, at 228-29 (quoting *United States v. Hall*, 26 F. Cas. 84, 86 (D. Pa. 1809) (No. 15,285)). The Court also introduced the notion that a "law of procedure" may violate the Ex Post Facto Clause if it takes away "any substantial right which . . . the defendant [had] at the time to which his guilt relates." *Id.*, at 232; *see also Thompson v. Utah*, 170 U.S. 343, 352-53 (1898)

(reversing the defendant's conviction on the basis of the Ex Post Facto Clause because the defendant was "deprive[d] . . . of a substantial right involv[ing] . . . his liberty" and his situation was "materially altere[d] . . . to his disadvantage").

When the Court in *Collins* revisited *Calder's* list of prohibited ex post facto laws, it specifically reexamined those cases that broadened the *Calder* list. Examining the apparent inconsistency between *Calder*, on the one hand, and decisions such as *Kring* and *Thompson v. Utah* on the other, *see Collins*, 497 U.S., at 45-52, the Court stated that *Kring* and *Thompson* had caused confusion in state and federal courts about the scope of the Ex Post Facto Clause. The Court overruled *Kring* because its holding unjustifiably departed from the meaning of the clause as it was understood at the time of the Constitution's adoption. *Id.*, at 47-50. The Court noted that *Kring* relied heavily upon the language in *United States v. Hall*, 26 F. Cas. 84 (D. Pa. 1809) (No. 15,285), in order to justify its departure from "*Calder*'s explanation of the original understanding of the Ex Post Facto Clause," but that "[t]he language in the *Hall* case . . . [did] not support a more expansive definition of ex post facto laws." *Collins*, 497 U.S., at 49. As the Court explained, the language in *Hall* condemned a law that abolished a defense of justification or excuse as being ex post facto. *Id.* The Court remarked that *Hall's* analysis was "consistent with the *Beazell* framework," but that "[n]othing in the *Hall* case supports the broad construction of the ex post facto provision given by the Court in *Kring*." *Id.*, at 49, 50.

The Court also overruled *Thompson v. Utah* to the extent it rested on the Ex Post Facto Clause and not the Sixth Amendment right to a jury trial. *Id.*, at 51-52.

The Court concluded that the Texas statute at issue in *Collins* did not violate the Ex Post Facto Clause because the statute: (1) did not punish a previously committed act that was innocent when committed; (2) did not increase the punishment for a crime after its commission; and (3) did not deprive the defendant of a defense available by law at the time of the commission of the offense. *Id.*, at 52. In overruling *Kring* and *Thompson*, the Court made clear that "disadvantage" to the defendant will not be sufficient to invoke the Ex Post Facto Clause.

D. *Collins* Also Rejects Carmell's Assertion that the 1993 Amendments Deprived Him of a Defense.

Carmell asserts that application of the 1993 amendments to his case improperly deprived him of a defense. Pet. Br. 29-30. When the Court in *Collins* overruled *Kring*, it observed that *Kring* could be reconciled with prior cases by asserting that the change in Missouri law took away a defense available to the defendant. 497 U.S., at 50. The Court also noted, however, that those prior cases had broadly interpreted the term "defense," in contrast to the narrow, technical meaning used in *Beazell*, in which "the term was linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.'" *Id.* (quoting *Beazell*, 269 U.S., at 169-70).

> "The 'defense' available to Kring under the Missouri law was not one related to the definition of the crime, . . . Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge. . . ." *Id.*

Carmell wrongly suggests that a challenge to the sufficiency of the evidence under a corroboration rule is a

"defense" that can support an ex post facto challenge. The same argument could be made about any changed evidentiary rule—consider *Hopt* or *Thompson v. Missouri*, for example. *Collins*, however, made clear that only defenses that relate to the definition of the crime, ordinarily affirmative defenses like "excuse or justification," can implicate the Ex Post Facto Clause. *Id.*

Carmell's claim of an "absolute defense," Pet. Br. 29, is also insupportable because it is the legislature's sole province to define defenses or affirmative defenses, and the legislature has never identified lack of corroborating evidence as a defense or affirmative defense to prosecution for the offenses of sexual assault and indecency with a child. The Texas Penal Code specifically provides that a defense or affirmative defense to an offense will include the phrase: "[i]t is a defense to prosecution" or "[i]t is an affirmative defense to prosecution." TEX. PEN. CODE ANN. §§ 2.03, 2.04 (Vernon 1994). Although the code expressly provides defenses and affirmative defenses for Carmell's offenses, *see id.* § 21.11(b); *id.* § 22.011(d), (e), neither offense (nor any other in the Texas Penal Code) sets out the lack of corroboration of the victim's testimony as a defense or affirmative defense. Carmell was not improperly denied a defense to the crimes for which he was convicted.

IV. THE CORE CONCERNS OF THE EX POST FACTO CLAUSE WERE NOT IMPLICATED BY THE APPLICATION OF THE 1993 AMENDMENTS TO CARMELL'S TRIAL.

Carmell argues that applying the 1993 outcry statute in order to convict him violated the "fundamental purpose" of the Ex Post Facto Clause and that he fell victim to a "legislature[] . . . respond[ing] to an emotionally charged electorate" that changed the outcry statute "in order to

convict a class of unpopular defendants." *See* Pet. Br. 14. While it is true that the Ex Post Facto Clause protects persons from legislative abuses, that is not the only purpose that the clause serves and, in any event, Carmell was not subjected to a hot-blooded legislature that vindictively singled out him, or others like him, for unfair treatment.

A strong bias against ex post facto laws has existed since ancient times[16] and existed in America at the time of the Constitutional Convention of 1787. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) (Chase, J.). This bias was so entrenched that some of the framers of the United States Constitution thought that an ex post facto clause would be unnecessary and that inserting such a prohibition would "proclaim that we are ignorant of the first principles of Legislation." 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376, 378-79 (1937). The prevailing view, however, was that ex post facto laws were so inimical to individual liberty and the basic principles of republican government that the prohibitions against ex post facto laws in the Constitution were a necessary restraint against legislative excesses. *Id.*, at 375-76; *see also* THE FEDERALIST No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961) (declaring that "ex-post-facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legisla-

---

[16] The ancient Greeks denounced retroactive lawmaking. Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775 (1936) (citing the case of Timokrates and the Athenian Ambassadors as an example of the Greeks' abhorrence of retroactive lawmaking). Roman law recognized the principle that no man can change his purpose to another's injury. *Id.* (noting that Corpus Juris Civilis, Digest announced the principle "nemo potest mutare consilium suum in alteris injuriam").

tion"); THE FEDERALIST No. 84, at 511-12 (Alexander Hamilton) ("The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law . . . and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.").[17]

Justice Chase noted in *Calder* that the framers of the Constitution felt that the Ex Post Facto Clause was a necessary safeguard against punitive and arbitrary lawmaking by vindictive legislatures. *See* 3 U.S. (3 Dall.), at 388-89.[18] Chief Justice Marshall reiterated the same

[17] *See also* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1275 (1998) (noting that the Ex Post Facto Clause derives prominence from its location in article I of the Constitution that is "otherwise reserved for structural issues of broad democratic governance"); Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CAL. L. REV. 269, 269 (1927) (attaching importance in the primacy of the Ex Post Facto Clause relative to the Bill of Rights).

[18] Carmell mentions the 1696 case of Sir John Fenwick as an example of the type of vindictive lawmaking that influenced the framers adoption of the Ex Post Facto Clause. Pet. Br. 16. Carmell claims that his case "is a clear violation of the Ex Post Facto Clause" like the Fenwick case because "Texas convicted [Carmell] of a crime on the testimony of one witness when the law in effect at the time of his conduct required the testimony of two witnesses." *Id.*, at 9. Aside from the fact that the outcry statute has never had a two-witness rule requirement, *see supra* Part III.A, Carmell's reliance on the Fenwick case is misplaced. Although Justice Chase cites the case as an example of the British Parliment passing an ex post facto law that altered the rules of evidence in order to convict Sir John Fenwick of treason, Parliament actually passed a bill of attainder convicting him without a judicial trial because it lacked sufficient evidence (*i.e.*, only one witness could be secured to provide testimony against Fenwick) to convict him in a court of law. *People v. Hudy*, 73 N.Y.2d 40, 53 n.8, 535 N.E.2d 250, 257 n.8 (1988); Derek J.T. Adler, Note, *Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 FORDHAM L. REV. 1191, 1211 n.113 (1987). In other words, Parliamment did not change the law to convict Fenwick of an act that was innocent when it was committed, *i.e.*, an ex post facto law; rather, Parliament passed a bill of attainder in order to convict Fenwick without a jury trial. *Hudy*, 73 N.Y.2d at 53 n.8, 535 N.E.2d at 257 n.8; Adler, Note, *Ex Post Facto*, at 1211 n.113; *see also Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-47 (1984) (defining a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial"). Fenwick's case has no application to this case.

view ten years later in *Fletcher v. Peck*, 10 U.S. (6 Cranch 87 (1810), in which he stated that "the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment," and that the Ex Post Facto Clause's "restrictions on the legislative power of the states are obviously founded in this sentiment." *Id.*, at 137-38.

Two of the best examples of vindictive and abusive lawmaking by state legislatures that were found to violate the Ex Post Facto Clause are the test oath cases. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). In *Cummings*, the Court noted that the Missouri constitution was framed at the time of the Civil War, that "the struggle for ascendency" in that state had aroused "fierce passions," and that "[i]t was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard." *Id.*, at 322. Thus, as the test oath cases exemplify, one of the core concerns of the Ex Post Facto Clause is protecting against vindictive legislative enactments that are directed toward maligned persons of the moment in times of political upheaval.

In evaluating the presence of vindictive lawmaking, the Court has sometimes focused on the legislature's intent

and purpose in enacting the challenged law. *See Hawker v. New York*, 170 U.S. 189, 196 (1898) (looking to the legislature's intent in enacting a law that prohibited convicted felons from practicing medicine and rejecting an ex post facto challenge because "[t]he state [was] not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character"); *see also James v. United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part) ("[T]he policy of the prohibition against ex post facto legislation would seem to rest on the apprehension that the legislature in imposing penalties on past conduct . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons."); *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (holding that Congress intended to regulate the waterfront, not punish ex-felons, by enacting a statute that prohibited unions from soliciting or collecting dues from workers on the New York waterfront if any officer or agent of the union had been previously convicted of a felony); *Trop v. Dulles*, 356 U.S. 86, 95-96 (1958) (stating that in deciding whether a law is penal, the Court's determination "normally depends on the evident purpose of the legislature").

Carmell does not attempt to suggest that he, personally, was vindictively singled out by the 73rd Legislature for unfair treatment. Rather, Carmell asserts that "the legislative purpose here was to exact retribution against a paradigmatically unpopular group—alleged sex offenders"—of which he is a member. *See* Pet. Br. 17. The sole support Carmell cites for that assertion—the bill analysis of the 1993 amendments—is bereft of any suggestion that the legislature was acting in the heat of the moment to "exact [political] retribution" against sex offenders.

Supporters of the bill were focused on the victims of sexual assaults, not sex offenders. They recognized that "a long overdue change in Texas law governing the trial of sexual assault cases" was needed because "the nature of sexual assaults [was] such that the victim is often the only witness to the crime other than the defendant." HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 261, 73rd Leg., R.S. (1993). They sought to remove the "arbitrary" and "artificial" barrier in the 1983 version of the outcry statute that presented "an absurd obstacle for prosecuting" sexual assault cases. *Id.* Some supporters of the bill believed that the outcry and corroboration requirements of the former outcry statute were "based on cruel and outdated notions about the victims of sex crimes" and that "[v]ictims in sexual assault cases [were] no more likely to fantasize or misconstrue the truth than victims of most other crimes, which do not require corroboration of testimony or previous 'outcry.'" *Id.*

Statistics indicated that "in the majority of sexual assault cases, the offenders [were] acquainted with the victim," that "[i]n these situations particularly, the victim may feel that the perpetrator will be believed and the victim will not," and that "[b]ecause of these fears, victims of sexual offenses often hesitate[d] to 'cry out' to someone." *Id.* Supporters hoped to "remove . . . [a] vestige of sexism and prejudice against women, the primary victims of these crimes," and to bring Texas in line with "most states [which] no longer require[d] this type of corroboration." *Id.*

The Texas Legislature acted not out of vindictiveness toward sex offenders like Carmell, but out of concern for their victims. The 1993 amendments were not the result of political upheaval, nor was political retribution their purpose. The purpose and intent of the legislature was to protect a particularly vulnerable class of persons who

were statistically more likely to fall prey to sex offenders but not report the crime because of their relationship with the perpetrator. *See Hawker*, 170 U.S., at 196; *DeVeau*, 363 U.S., at 160. A prior legislature—without any support in the common-law development of corroboration requirements in Texas—had burdened young sex crime victims and prosecutors with an unnecessary (and unfair) corroboration requirement. The legislature in 1993 sought not to stack the deck against alleged sex offenders, as Carmell asserts, but simply to put them on a level playing field with other criminal defendants. This Court has never suggested, much less held, that such an enactment violates the Ex Post Facto Clause.

Moreover, protecting against legislative vindictiveness is only one of the core concerns of the Ex Post Facto Clause. The other concerns—ensuring fair warning and protecting reliance on existing laws—are equally important. Yet, besides a passing reference in a footnote, Pet. Br. 17 n.9, Carmell fails to discuss the other core ex post facto concerns addressed in several recent decisions of the Court. *See, e.g., Miller v. Florida*, 482 U.S. 423 (1987); *Weaver v. Graham*, 450 U.S. 24 (1981); *Dobbert v. Florida*, 432 U.S. 282 (1977). The Court has characterized an ex post facto law as one that fails to provide fair warning of the punishable conduct and frustrates one's reliance on existing laws. *See Weaver*, 450 U.S., at 28-29 (stating that the framers considered the Ex Post Facto Clause as a means "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"); *Dobbert*, 432 U.S., at 297-98 (stating that Florida's death penalty statutes "provided fair warning as to the degree of culpability which the State ascribed to the act of murder" and "the penalty which Florida would seek to impose upon him if he were convicted of first-degree murder").

The policy behind the fair warning rationale is that "[a]n individual should be warned that his contemplated acts are punishable and of the extent to which they can be punished, since only if he is warned of these consequences can society expect him to refrain from acting." Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1496 (1975). Similarly, the policy underlying the twin evil of frustrated reliance is that "[a]n individual who acted in reliance upon existing definitions of crimes cannot fairly be punished and cannot be punished without detracting from the liability of the criminal law to provide guidance for conduct." *Id.* The Court has recognized that the fair warning and reliance rationales are "central to the ex post facto prohibition." *Miller*, 482 U.S., at 430.

The fair warning and reliance rationales do not even remotely suggest that the 1993 outcry statute is an ex post facto law. Carmell had fair warning that his inappropriate sexual relationship with KM was illegal. Carmell—both generally as a citizen and specifically as an incest counselor—knew that sexually abusing a child was a criminal act for which the State could properly punish him. Consequently, the district court's application of the 1993 outcry statute in Carmell's trial was not obnoxious to the Ex Post Facto Clause's core concern for fair warning, because Carmell had all the warning he needed to know that his conduct was criminal and of the punishment he might receive if convicted.

Carmell does not expressly claim a reliance interest in the continued application of the 1983 outcry statute, but it is implicit in his assertion that the application of the 1993 amendments to his conduct unfairly allowed him to be convicted of the crimes he committed. The Court should neither recognize nor legitimize that form

of reliance as part of an ex post facto analysis because it is undeserving of constitutional protection. Carmell "had no legitimate right to rely on a procedural rule that neither affected his culpability nor his expected punishment but instead merely made the prosecution's case against him more difficult to prove." *People v. Hudy*, 73 N.Y.2d 40, 54, 535 N.E.2d 250, 258 (1988) (holding that application of statute repealing requirement of corroboration of minor victim's testimony in certain sex-crime prosecutions did not violate Ex Post Facto Clause). The amendment of the outcry statute "did nothing more than remove an obstacle arising out of a rule of evidence." *Id.* (quoting *Thompson v. Missouri*, 171 U.S. 380, 387 (1898)).

The Court has recognized that the reliance interest gives individuals confidence that their actions, if legal when done, will not later be declared illegal; it emphatically does not, however, permit individuals confidently to structure their crimes so as to maximize the prosecution's difficulty in proving the case without having to worry that the legislature will close an evidentiary loophole. The interest that Carmell "wants elevated to the level of a constitutional right is a rather dubious interest in being acquitted at trial after having committed a criminal offense—an interest hardly worth preservation." *Note, Ex Post Facto Limitations*, at 1513. If Carmell's view of ex post facto protection were adopted, it would promote criminal sophistication rather than honest living.

The change in the outcry statute (1) was not the result of legislative abuse, (2) did not create criminal liability without warning, and (3) did not frustrate reasonable reliance on existing laws. Accordingly, application of the 1993 outcry statute to convict Carmell did not violate the Ex Post Facto Clause, because the core concerns of that

clause were not implicated by the 1993 amendments to the statute.

CONCLUSION

For these reasons, the judgment of the Texas court of appeals should be affirmed.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas
Counsel of Record
ANDY TAYLOR
First Assistant Attorney General
LINDA S. EADS
Deputy Attorney General for Litigation
GREGORY S. COLEMAN
Solicitor General
PHILIP A. LIONBERGER
Assistant Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700
Counsel for Respondent

October 20, 1999

(8)

No. 98-7540

In The

Supreme Court of the United States

SCOTT LESLIE CARMELL,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari
To The Texas Court Of Appeals

REPLY BRIEF OF PETITIONER

RICHARD D. BERNSTEIN*
CARTER G. PHILLIPS
KATHERINE L. ADAMS
PAUL A. HEMMERSBAUGH
BRIAN C. KALT
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

**Counsel of Record*

November 15, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

App

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

STATE STATUTE

COURT RULE

OTHER AUTHORITIES

INTRODUCTION

Respondent's position would erode the foundation of Ex Post Facto Clause law – the four-category formulation of prohibited ex post facto laws enunciated more than two centuries ago in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), and affirmed in numerous subsequent decisions of this Court, lower federal courts, and state courts. Respondent and its *amici* make essentially four arguments in support of their position.

First, they argue that the retroactive statutory change at issue in this case is not within the terms of *Calder*'s fourth category. This argument is refuted by the clear language of *Calder*. Second, Respondents argue that *Calder*'s fourth category has been overruled. As demonstrated below, far from overruling category four, this Court has consistently reaffirmed that *Calder*'s four categories are the definitive formulation of the prohibitions of the Ex Post Facto Clause, and expressly *distinguished Calder*'s fourth category when laws falling outside that category were upheld. Third – and the crux of the matter – they argue that the Court should take this opportunity to overrule *Calder* category four, because it is allegedly not consistent with the original understanding of the Ex Post Facto Clause and its underlying policies. *Calder*'s fourth category should not be overruled because the stability of ex post facto law is vital for both legislatures and citizens. *Calder* category four, particularly as it applies to the retroactive criminal law at issue, prevents singling out disfavored groups or persons for *retroactive* application of new criminal laws. Respondent's historical argument is based on excerpts from general discussions covering broader topics, none of which purported to be offering a complete list of ex post facto laws.

At bottom, Respondent's position would eliminate the fundamental protection provided by *Calder*'s fourth category – for all people and all future cases – in order to prevent one specific accused sexual offender from having some of his convictions overturned. There can be no exception, however, to the proscriptions of the Ex Post Facto Clause for a "bad crime," a "bad man" or an "unwise" prior law, because any such exception would swallow the rule.

Finally, respondent and its *amici* argue that the retroactive elimination of the defense on the merits at issue here is not proscribed by *Beazell* v. *Ohio*, 269 U.S. 167 (1925). *Beazell* indicates that laws that provide a defense "which may be considered by the court and jury in determining guilt or innocence" may not be changed retroactively. *Id.* at 170. It notes as one such law, a law that establishes the "[t]he quantum and kind of proof required to establish guilt." *Id.* At the time of the alleged conduct at issue, the prior Texas statute provided a complete defense *on the merits* to a person in Petitioner's position. Under that law, the absence of corroboration or outcry entitled Petitioner to an acquittal as a matter of law. Because this defense directly determined the ultimate question of guilt or innocence, retroactive elimination of that defense runs afoul of the core of *Beazell*'s prohibition.

ARGUMENT

I. RETROACTIVE APPLICATION OF THE 1993 AMENDMENT OF ARTICLE 38.07 FALLS SQUARELY WITH THE CONSTITUTIONAL PROHIBITION ON EX POST FACTO LAWS ENUNCIATED IN *CALDER* V. *BULL*.

Retroactive application of the 1993 Amendment falls squarely within *Calder*'s fourth category, which proscribes "[e]very law that *alters the legal rules of evidence, and receives less*, or different, *testimony, than the law required* at the time of the commission of the offence, *in order to convict the offender*." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphases added). Retroactive application of the 1993 Amendment to Petitioner did precisely that. Under the law in effect at the time of Petitioner's alleged conduct, the absence of corroborating testimony meant that, as a matter of law, KM's testimony was insufficient evidence "to convict the offender." See Tex. Code Crim. Proc. art. 38.07 (1983); Pet. Br. 4-7, 12-13.[1]

---

[1] Respondent argues for the very first time in its merits brief before this Court that the 1983 version of Article 38.07 did not require eyewitness corroboration, and that the evidence adduced at Petitioner's trial was somehow sufficient to satisfy the corroboration requirement of the pre-amendment version of Article 38.07. *See* Resp. Br. 4 n.2, 17 n.9. Respondent never previously argued – in its opposition to certiorari or in any of its state court appellate briefs – that there was sufficient evidence of corroboration under the prior statute. *See, e.g.*, Resp. Br. in Opp. to Cert. at 4-8 (Apr. 26, 1999); *id.* at 5 (arguing that, because 1993 Amendment applied retroactively, "corroboration of a fourteen year-old victim's testimony was no longer required at the time of . . . trial, even when the victim had not made an outcry for several years."); *id.* at 6 n.5 (citing without contesting Petitioner's assertion that "there was no corroborating evidence" at trial); Appellee's Brief at 46-49 (Oct. 31, 1997);

Petitioner's conviction was made possible solely by the retroactive application of the 1993 Amendment –

Appellee's Supplemental Brief at 1-2 (Feb. 12, 1998). (Respondent's two state court appellate briefs have been lodged with the Clerk.) For several reasons, this newfound argument is unavailing. *First*, Respondent's failure to raise the argument before the Texas appellate courts constitutes a waiver of the argument before this Court. *See, e.g., Riggins* v. *Nevada*, 504 U.S. 127, 133 (1992); *Carter* v. *Kentucky*, 450 U.S. 288, 304 (1981) (refusing to consider argument advanced by state in United States Supreme Court, because government failed to present the argument to the Kentucky Supreme Court). *Second*, in any event, the Court should deem the issue waived because it was not raised in Respondent's opposition to the petition for certiorari. Sup. Ct. R. 15.2; *City of Canton* v. *Harris*, 489 U.S. 378, 383-85 (1989). *Third*, if the corroboration issue had been raised below, the fact that the Texas Court of Appeals decided the constitutional question would indicate that the court concluded the evidence at trial was insufficient to satisfy the corroboration requirement of the pre-amendment statute. Like federal courts, Texas state courts do not address the constitutionality of a statute if a case may be decided without reaching the constitutional question. *See, e.g., Baptist Hosp. of Southeast Texas, Inc.* v. *Barber*, 714 S.W.2d 310 (Tex. 1986). *Fourth*, because Texas courts appear divided on the question of whether Article 38.07 requires eyewitness corroboration, *compare Shelby* v. *Texas*, 800 S.W.2d 584, 586 (Tex. App. 1990), *rev'd on other grounds*, 819 S.W.2d 544 (Tex Crim. App. 1991), *and Heckathorne* v. *Texas*, 697 S.W.2d 8, 12 (Tex. App. 1985, pet. ref'd), *with Zule* v. *Texas*, 802 S.W.2d 28, 32 (Tex. App. 1990, pet. ref'd), Respondent is effectively asking this Court to act as the final arbiter of Texas law, a function properly reserved to the Texas Supreme Court. *See, e.g., R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 381 (1992). Finally, contrary to the implication at Resp. Br. 4 n.2, *no* witness, other than KM, testified to the jury that he or she saw any indication of any illegal contact between KM and petitioner. *See, e.g.*, Trial Tr. 305-06 (testimony of mother Eleanor that she never saw Petitioner do anything sexual with KM); *id.* at 310 (mother's testimony that she had "absolutely" no inkling about alleged

which, as Respondent concedes, "abrogat[ed] . . . the corroboration requirement" of the prior law. Resp. Br. 16. The 1993 repeal of the corroboration requirement was thus a substantive change in Texas criminal law which allowed the prosecution to convict Petitioner based on "less or different testimony" (KM's testimony alone) than the minimum required (KM's testimony *plus* corroboration or outcry) at the time of the alleged conduct. See *Calder*, 3 U.S. at 390.

Respondent's argument that category four prohibits only retroactive changes in "the definition of crimes" or "increases [in] punishment," Resp. Br. 7, 23, makes no linguistic or logical sense. If this were true, there would be no category four, because it would be entirely redundant of categories one and three.

II. THE COURT HAS CONSISTENTLY AFFIRMED THE FOUR *CALDER* CATEGORIES AS THE TOUCHSTONE FORMULATION OF THE PROHIBITIONS OF THE EX POST FACTO CLAUSE.

Contrary to Respondent's argument, the Court has consistently affirmed that the laws prohibited by the Ex Post Facto Clause are those set forth in the four *Calder* categories, including the fourth category. See, *e.g.*, *Collins* v. *Youngblood*, 497 U.S. 37, 46 (1990) ("the prohibition which may not be evaded is the one defined by the *Calder* categories"). From 1798 to the present, the Court has cited *Calder*'s four categories, including the fourth category's core prohibition of laws retroactively changing the

---

(sex) crimes at the time). Evidence that petitioner sent his stepdaughter cards and gifts, or that KM identified a massage vibrator, Resp. Br. 4 n.2, is not evidence corroborating alleged sexual contact between KM and Petitioner.

amount of proof required for conviction, as defining the scope of the prohibition against ex post facto laws. See, *e.g.*, *Lynce* v. *Mathis*, 519 U.S. 433, 441 n.13 (1997) (quoting with approval all four *Calder* factors).

Respondent does not argue – because it cannot – that the Court has expressly overruled the fourth category. Indeed, if this Court had already expressly overruled *Calder*'s fourth category, it is doubtful that the Court would have granted Petitioner's *pro se* certiorari petition. Instead, Respondent and *amici* rely upon strained constructions of a few of this Court's subsequent cases to argue that the category has been "implicitly" overruled. Resp. Br. 23. In fact, the very cases upon which Respondent relies demonstrate the continuing vitality of the fourth category.

Respondent relies heavily on *Collins* for its argument that the Court has rejected the four *Calder* categories in favor of a narrower two-part test. Resp. Br. 15-18. Far from limiting *Calder*, however, *Collins* expressly and unequivocally reaffirmed the *Calder* categories. *Collins*, 497 U.S. at 46. What *Collins* rejected was expansion of the Ex Post Facto Clause beyond the four *Calder* categories. *Id.* at 46-51. *Collins* overruled two late nineteenth century decisions precisely because they exceeded *Calder*'s scope. *Id.*; see *id.* at 49 (rejecting a "more expansive definition of ex post facto laws" adopted by *Kring* v. *Missouri* and *Thompson* v. *Utah*, because "[t]he Court's departure from *Calder*'s explanation of the original understanding of the Ex Post Facto Clause was . . . unjustified").

The United States rests its argument that *Collins* overruled *Calder*'s two-hundred-year-old rule on a footnote. See U.S. Br. 10-12 (citing *Collins*, 497 U.S. at 43 n.3). This is more than this footnote can bear. *First*, contrary to the

United States' contention, the *Collins* footnote did not conclude that *Calder* category four was "overbroad." Rather, it rejected any interpretation of *Calder*'s fourth category that would cover all alterations in the " 'legal rules of evidence.' " 497 U.S. at 43 n.3. This is correct, as Petitioner has emphasized. Pet. Br. 20. *Calder*'s fourth category contains the *conjunctive* requirement that the new law permit conviction on "*less, or different, testimony than the law required* at the time of the commission of the offense, *in order to convict the offender.*" 3 U.S. at 390 (emphases added). The United States' discussion also omits the approving citation, in the very same *Collins* footnote, to the statement in *Hopt* v. *Utah*, 110 U.S. 574, 590 (1884) that "approv[ed] procedural changes [that] *'leav[e] untouched the . . . amount or degree of proof essential to conviction.'* " *Collins*, 497 U.S. at 43 n.3 (emphasis added).

Second, contrary to Respondent's suggestion, the text in *Collins* to which footnote three is appended makes clear that the Court understands *Beazell* to be an affirmation of the four *Calder* categories. See *id.* at 42. In that discussion, the Court first quotes the four *Calder* categories, cites cases affirming *Calder*'s formulation, and concludes that *Beazell* was simply summarizing the "well-accepted" "principles" enunciated in *Calder*. *Id.* Thus, far from overruling *Calder*'s fourth category, footnote three provides further support for the *Collins*' holding that "the prohibition which may not be evaded is . . . defined by the *Calder* categories." *Id.* at 46.[2]

---

[2] Contrary to the further contention of the United States, U.S. Br. 12-13, this Court's two Ex Post Facto Clause decisions rendered after *Collins* do not, in any way, undercut *Calder*'s

Respondent and its *amici* similarly misapprehend the two other cases upon which they rely to argue that *Calder* category four has been overruled, *Hopt* v. *Utah*, 110 U.S. 574 (1884) and *Beazell* v. *Ohio*, 269 U.S. 167 (1925). In *Hopt*, the Court held that retroactive application of a procedural rule "enlarg[ing] the class of persons who may be competent to testify" did not violate the Ex Post Facto Clause, because it did not reduce the "quantity or the degree of proof necessary" to convict the accused. 110 U.S. at 589. The Court expressly distinguished the facially neutral evidentiary change at issue in that case from a change which, like the retroactive elimination of the corroboration requirement here, allows conviction on less evidence than required by the law in effect at the time of the conduct, explaining: "[a]ny statutory alteration of the legal rules of evidence which would authorize conviction upon *less proof, in amount or degree*, than was required when the offence was committed, might, in respect of that offence, *be obnoxious to the constitutional inhibition upon ex post facto laws.*" *Id.* at 590 (emphasis added).

Respondent asserts that "less proof" in *Hopt* refers only to a change in a generalized burden of proof – *e.g.*, absolute certainty – not a specific burden of proof – *e.g.*,

---

fourth category. Neither of those cases involved retroactive changes affecting the requirements for conviction or determination of guilt. Rather, the issue in both of those cases was the question of *post*-conviction changes in the law that might enlarge punishment, specifically whether a retroactive change in the law impermissibly increased the punishment for persons who had already been convicted and were serving prison sentences. *See Lynce* v. *Mathis*, 519 U.S. 433 (1997); *California Dep't of Corrections* v. *Morales*, 514 U.S. 499 (1995). Moreover, *Lynce* quoted *Calder*'s fourth category with approval. 519 U.S. at 441 n.13.

the requirement of a corroborating witness. "Less" means "less." As Respondent concedes, the prior Texas statute set a minimum "sufficiency of evidence." Resp. Br. 18. The new statute enabled petitioner's conviction on "less" evidence, *i.e.*, without corroboration or outcry.[3] In all events, *Hopt* simply cannot be read to overrule *Calder*'s fourth category.[4] *Beazell* is also fully consistent with the core prohibition of *Calder*'s fourth category. *Beazell* held that changes in "the manner in which the trial of those . . . accused shall be conducted" do not offend the Ex Post Facto Clause. 269 U.S. at 170. The next three sentences distinguish categories of laws that were not at issue in *Beazell* but would violate the Ex Post Facto Clause. The first two of these three sentences mirror the first three *Calder* categories, *i.e.*, they describe laws that change the "legal definition of the offense" (*i.e.*, *Calder* category one), increase the "criminal quality of the act charged" (*i.e.*, category two), and increase "punishment" (category three). 269 U.S. at 170. The third sentence certainly

---

[3] Moreover, respondent's argument is based on an elliptical quotation of a single sentence that leaves out the very language quoted by *Collins*. Resp. Br. 23. The omitted language reiterates that the Court was approving only retroactive changes that "*leav[e] untouched* the nature of the crime and the *amount* or degree *of proof essential to conviction*," *Hopt*, 110 U.S. at 590 (emphasis added). *See Collins*, 497 U.S. at 43 n.3.

[4] Contrary to Respondent's suggestion, and unlike the change in the law at issue in *Hopt*, Article 38.07's corroboration requirement was not a witness competency rule. *See* Resp. Br. 25-27. Both before and after the 1993 Amendment, KM was fully competent to testify. However, only after the statutory change was her testimony sufficient by itself to sustain a conviction. *Hopt* expressly distinguished such a statutory change from a change in witness competency rules. *Hopt*, 110 U.S. at 590.

includes *Calder*'s fourth category: "*The quantum* and kind *of proof required to establish guilt*, and *all questions* which may be considered by the court and jury in *determining guilt or innocence*,. . . ." 269 U.S. at 170 (emphases added). Indeed, this Court has recognized that *Beazell* simply summarized the "well-accepted . . . principles" enunciated in *Calder*. *Collins*, 497 U.S. at 42.

III. *CALDER*'S FOURTH CATEGORY IS CONSISTENT WITH THE HISTORY AND PURPOSES ANIMATING THE EX POST FACTO CLAUSE, AND THE COURT SHOULD NOT OVERRULE THIS IMPORTANT RULE.

Calder's formulation of the four categories of laws prohibited by the Ex Post Facto Clause should carry with it a strong presumption of validity. The formulation, announced by Justice Chase shortly after the ratification of the Constitution, " 'has never been denied' " by any decision of this Court. *Collins*, 497 U.S. at 42 (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 391 (Miller, J., dissenting) (1867)); see Pet. Br. 23 n.13. For more than two hundred years, this Court has repeatedly and consistently cited the four *Calder* categories as definitive.

A. Stability in ex post facto law is at least as important as in any other context. In order for the Court to provide clear guidance to both the federal and state legislatures, and for the Ex Post Facto Clause to perform its essential functions, it is critical that the Court maintain clear and unshifting rules regarding what legislative acts are and are not unconstitutional, retroactive criminal laws. Overruling, after 201 years, one of *Calder*'s bedrock

four categories would surely undermine that essential stability.[5]

B. *Calder*'s fourth category is necessary to fulfill a basic purpose of the Ex Post Facto Clause: to protect individuals or groups from being singled out for *retroactive* criminal legislation. See, *e.g.*, *Miller* v. *Florida*, 482 U.S. 423, 429-30 (1987); *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810); Pet Br. 14-19.[6] The Ex Post Facto Clause is a

---

[5] The United States argues that category four may be readily overruled because it was dicta. *See* U.S. Br. 13-14. This argument, if it were accepted, would apply equally to all four of the *Calder* categories. Moreover, the potential implications of this argument are broad and unsettling. The argument would call into question fundamental precepts enunciated in dicta by the Supreme Court in other important foundational cases in the early years of this nation. For example, if *Marbury* v. *Madison* were confined to its narrow holding that this Court lacked original jurisdiction over that case, *see* 5 U.S. (1 Cranch) 137, 170-77 (1803), then the foundations of the legitimacy and scope of judicial review – established in an extensive discussion that was dicta – could be open to question. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). To the knowledge of Petitioner's counsel, this Court has never called into question any of the foundational principles of early landmark decisions such as *Marbury*, *or Calder* v. *Bull*, on the ground that they were (often) dicta.

[6] Contrary to Respondent's suggestion, Resp. Br. 2, 7, 40-42, the Court has never held that a showing of reliance by the accused is necessary to demonstrate that a retroactive statutory change violates the Ex Post Facto Clause. Rather, the Court has simply noted that, in addition to prevention of retroactive criminal legislation that singles out disfavored groups, a "*second* concern" underlying the Clause is to " 'give fair warning' " and allow reliance on existing laws "until [they are] explicitly changed." *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (emphasis added). For example, if reliance were required, *Calder*'s second and third categories would be in doubt. If a state changed the

constitutional bulwark against such acts of the legislature, which, by its nature, may respond to popular passions to the detriment of disfavored groups. As this Court has explained, the Clause serves to enforce structural limitations on the legislative branch established by the Constitution, "uphold[ing] the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver*, 450 U.S. at 29 n.10 (citing *Ogden* v. *Blackledge*, 6 U.S. (2 Cranch) 272, 277 (1804)). Simply put, it is improper for legislatures to place their thumb on the judicial scale in order to ensure convictions for *past* conduct. That is indisputably what the retroactive application of the new Texas statute was designed to do and in fact does. See Pet. Br. 17-18.

Moreover, as Petitioner has demonstrated, the *retroactive* repeal of the corroboration requirement was plainly targeted at an unpopular group. See Pet. Br. 17-19. Respondent misapprehends the nature of the constitutional violation when it contends that the 1993 amendment merely "put [petitioner] on a level playing field with other criminal defendants." Resp. Br. 40. As Petitioner has emphasized, it is entirely constitutional for the Texas legislature to change the corroboration requirement, so long as it makes the change *prospective*. The vindictive aspect of the 1993 repeal of the corroboration requirement that singled out a disfavored group – and thus the source of its constitutional infirmity – was its

---

punishment for a particular kind of murder from life imprisonment to eligibility for capital punishment, it is doubtful that a murderer could show reliance on the prior limitation to life imprisonment in committing his or her crime.

retroactive application. Respondent points to no act of the Texas legislature in modern history making a retroactive change in the substantive criminal law applicable to all defendants, or even one singling out a group other than accused sex offenders.

In addition, other than perhaps a law that defines an element of the crime, it is difficult to imagine a law more inextricably intertwined with the question of a defendant's guilt or innocence than a law that establishes the minimum evidence necessary for conviction. Indeed, it is indisputable that the aim of the prior Texas statute was designed to protect the innocent, Pet. Br. 30 & 25 n.14; see Resp. Br. 26, and that the new statute is designed to make conviction easier and thus protect victims of sexual offenses, Pet. Br. 17-18. As *Calder* and *Beazell*, 269 U.S. 167, 170 (1925), indicate, legislative changes in rules governing the ultimate question of determining guilt or innocence may not be made retroactive.[7]

---

[7] As Petitioner demonstrated in his opening brief, the law at issue was enacted for substantive reasons and plainly affects substance, not procedure. *See* Pet. Br. 32-34. Beyond mere conclusory statements that Article 38.07 is a "procedural" law, neither Respondent nor its *amici* contest that an analogous law in a civil case – where a defendant's liberty is not at stake – would be considered substantive. *See id.* at 33-34. Indeed, Respondent's statement that "[t]he Texas Legislature acted . . . out of concern for the[ ] victims," Resp. Br. 39, makes clear that the purpose of the statutory change was substantive, not procedural. Indeed, Respondent (unintentionally) understates the importance of the public policy of protecting the victims of sexual offenses by any assertion that a law designed to implement that policy is merely procedural. *Cf. Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 429-30 (1996) (for *Erie*, state rule is substantive where the rule is phased as "a procedural instruction, but the State's objective is manifestly substantive") (citation omitted).

At times, Respondent's argument might be read to suggest there should be some sort of a "bad person," "bad crime," or "unwise prior law" exception to the protections of the Ex Post Facto Clause. See Resp. Br. 1-2, 11, 17, 39-40. Any such exception would effectively render the Clause a nullity. The legislature always believes that the changes it enacts to the criminal law are wise, and render "bad" people subject to criminal punishment. This Court would not second-guess such legislative policy choices. Rather, as Justice Harlan explained, the Ex Post Facto Clauses "rest on the apprehension that the legislature, in imposing penalties on past conduct, *even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong* . . . may be acting with a purpose . . . to impose by legislation a penalty against specific . . . classes of persons." *James* v. *United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., separate opinion) (emphasis added).

Thus, although this particular case involves conviction for a sexual offense and the prior Texas statute could readily be characterized as outmoded and unwise, those factors are irrelevant. If *Calder*'s fourth category were overruled, it would be overruled for all cases for all time.[8]

---

[8] This Court has wisely declined to dilute the protections of the Ex Post Facto Clause just because the particular case involved convicted sex offenders. *See, e.g., Miller*, 482 U.S. at 433-34 (refusing to allow retroactive increase in punishment for convicted sex offender, stating that "the sole reason for the increase was to punish sex offenders more heavily"); *accord, California Dep't of Corrections* v. *Morales*, 514 U.S. 499, 510-11 & n.7 (1995). *But see generally Frank* v. *Mangum*, 237 U.S. 309 (1915) (Court rejected habeas claims of Leo Frank, who had been convicted of molesting and murdering a female child); *id.* at 345 (Holmes and Hughes, JJ., dissenting).

C. Contrary to the contentions of the United States, U.S. Br. 13-18, the historical groundings of the Ex Post Facto Clause support *Calder*'s fourth category and Petitioner's position. See Pet. Br. 14-19. The United States attempts to narrow the fourth *Calder* category through a selective, wooden interpretation of constitutional history.

First, the United States cites the "narrow interpretation of the scope of the Clause" expressed in some of the debates at the Constitutional Convention, and in some of the Federalist Papers. U.S. Br. 17-18. Each of the citations the United States relies upon, however, mention *only* the first *Calder* category: " 'caus[ing] that to be a crime which is no crime' " (as one delegate said at the Convention) or " 'the subjecting of men to punishment for things which, when they were done, were breaches of no law' " (as stated in *Federalist* No. 84). *Id.* This is because none of the sources the United States cites is purporting to catalog all laws prohibited by the Ex Post Facto Clause. Rather, each source is a general discussion of the virtues of the Constitution, and is citing one example of those virtues from the Ex Post Facto Clause. If these "narrow" statements were viewed as definitive legal definitions, they would read out of the law not only the fourth *Calder* category, but the second and third – concerning retroactive aggravation of the crime and retroactive increases in punishment – as well.

In contrast to the contextually limited sources cited by the United States, Justice Chase analyzed the full scope of the Ex Post Facto Clause and offered a complete

taxonomy of its prohibitions. Thus, Justice Chase's enumeration of *Calder*'s fourth category, prohibiting laws "receiv[ing] less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender," is entitled to great weight, both for its closeness in time to the Constitution and for its place as an integral part of the first complete description of the scope of the Ex Post Facto Clause. Accordingly, this Court has emphasized the primacy of Justice Chase's four categories in *Calder*. *E.g.*, *Miller*, 482 U.S. at 429. Moreover, Respondent and its *amici* ignore the second source to give a complete description of the Ex Post Facto Clause: Justice Story. See Pet. Br. 21-23. He too stated that the Ex Post Facto Clause bars retroactive changes in criminal law "whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed." Joseph Story, *Commentaries on the Constitution of the United States* § 1339 (1833).

Second, examining the case of Sir John Fenwick, which informed *Calder*'s fourth category, the United States notes that the ex post facto law in Fenwick's case was inflicted via a bill of attainder. See U.S. Br. 15; see also Resp. Br. 36-37 & n.18. From this, the United States concludes that the fourth *Calder* category "appears to have been intended to apply only to laws that alter the rules of evidence to convict a particular, named offender." U.S. Br. 15. Of course, that is not what *Calder* says.

Calder itself illustrates the error and illogic of this argument. Just as Justice Chase supported the fourth category with a citation to *Fenwick*, he supported the first category – laws criminalizing actions that were "innocent when done" – with a citation to the 1641 case of the Earl

of Strafford. See *Calder*, 3 U.S. (3 Dall.) at 390 (Chase, J.); *id.* at 389 note a. In Strafford's case, Parliament "declar[ed] acts to be treason, which were not treason, when committed." *Id.* at 389. As in Fenwick's case, Strafford was convicted via a bill of attainder. See Zechariah Chafee, Jr., *Three Human Rights in the Constitution of 1787*, at 109-13 (1956) (describing Strafford's case). The United States' argument thus proves too much. Under the logic of the United States' position, the Ex Post Facto Clause would not prohibit a state from retroactively criminalizing innocent conduct, so long as the state applied the law to an entire class of offenders and did not single out a "particular, named offender." The fourth *Calder* category, like the first, is not redundant with the Attainder Clause, and is not limited to cases that single out individuals.

Finally, the United States contends that *Calder* did not mean what it said. Justice Chase, the United States, argues, expressed agreement with Blackstone's *Commentaries*, which mention only the first *Calder* category. See U.S. Br. 16. But Chase mentions Blackstone immediately after defining ex post facto laws as "those that create, or aggravate, the crime; or increase the punishment, *or change the rules of evidence, for the purpose of conviction*." *Calder* v. *Bull*, 3 U.S. at 391 (emphasis added). The United States' suggestion – that Justice Chase by his citation to Blackstone intended to flatly contradict the express language of his opinion – is thus unavailing.[9]

---

[9] The United States' contention that Justice Paterson "relied on Blackstone's definition," U.S. Br. 16, also must be placed in context. Justice Paterson relied on Blackstone only to support his argument that the Ex Post Facto Clause should not apply to civil laws – in the sentence immediately following his quotation of Blackstone, Paterson concludes that Blackstone "unquestionably

* * *

It remains, and always will remain, "a truism that constitutional protections have costs." *Coy* v. *Iowa*, 487 U.S. 1012, 1020 (1988). Calder's fourth category of prohibited ex post facto laws provides a necessary, though at times unpopular, limit on the reach of legislatures with respect to obtaining convictions for conduct that has already occurred. It properly protects against legislation that retroactively permits less or different proof for conviction of a past crime, especially when the law is retroactively directed at a disfavored group.

IV. RETROACTIVE REPEAL OF THE CORROBORATION REQUIREMENT IS ALSO UNCONSTITUTIONAL UNDER THE *BEAZELL* FORMULATION, BECAUSE IT DEPRIVED PETITIONER OF AN ABSOLUTE DEFENSE TO A FINDING OF "GUILT."

Retroactive application of the 1993 Amendment to convict Petitioner also violates *Beazell* v. *Ohio*, 269 U.S. 167 (1925). *Beazell*'s formulation, which the United States characterizes as "the definitive modern summary of the scope of the Ex Post Facto Clause," U.S. Br. 9, indicates that the Clause prohibits retroactive repeal of any defense "considered by the court . . . in determining guilt or innocence." *Beazell*, 269 U.S. at 170. The single example given for such a defense is a law establishing "[t]he

---

refers to crimes, and nothing else." *Calder*, 3 U.S. at 396 (Paterson, J.). Thus, Paterson relied on Blackstone solely for the limited proposition that the Ex Post Facto Clause does not cover civil cases. The same is true of the citation to Blackstone at the Constitutional Convention noted by the United States. *See* U.S. Br. 17.

quantum and kind of proof required to establish guilt." *Id*. *Collins* expressly declined to limit *Beazell*, stating that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause." *Collins*, 497 U.S. at 42-43.

There is no basis in logic or the policies animating the Ex Post Facto Clause for elevating "affirmative defenses" above defenses that establish that, as a matter of law, the defendant is not guilty. The pre-amendment version of Article 38.07 was designed to protect the potentially innocent from false accusations, and thus the State's failure to satisfy its terms required a judgment of acquittal. Pet. Br. 30, 25 n.14.[10] It thus provided a defense on the merits, or, in the language of *Beazell*, a defense "considered by the court . . . in determining guilt or innocence." *Beazell*, 269 U.S. at 170. Affirmative defenses, such as justification or excuse, apply when the government has carried its burden of introducing evidence necessary to establish a

---

[10] The State of Texas thus imposed a necessary precondition for it to obtain a conviction of the offenses at issue – proof of corroboration or outcry. Under the prior law, the government's failure to satisfy that condition compelled *acquittal*, not remand for a new trial. *See, e.g., Scoggan* v. *Texas*, 799 S.W.2d 679, 683 (Tex. Crim. App. 1990) (applying 1983 version of Article 38.07, holding that absence of corroboration or timely outcry compelled acquittal, remanding for entry of judgment of "acquittal"); *Friedel* v. *Texas*, 832 S.W.2d 420, 422 (Tex. App. 1992, no pet.) (same); *Jones* v. *Texas*, 789 S.W.2d 330, 333 (Tex. App. 1992, pet. ref'd) (same); *see also* Pet. Br. at 30. The requirement of a judgment of acquittal further distinguishes the condition imposed by Article 38.07 from mere evidentiary rules. When an appellate court finds rules of evidence were violated at trial, the normal course is to remand the case for a new trial, not to enter a judgment of acquittal. *See, e.g., Beltran* v. *State*, 728 S.W.2d 382, 389 (Tex. Crim. App. 1987).

prima facie case that the defendant committed an otherwise criminal act, but additional circumstances, such as justification or insanity, nonetheless allow a verdict of not guilty. There is no principled basis to argue that such affirmative defenses are somehow more significant for Ex Post Facto Clause purposes than defenses – like Petitioner's defense in this case – that require a determination that the defendant is not guilty in the first instance.

CONCLUSION

Petitioner's convictions on Counts 7-10 should be reversed and the remainder of the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

RICHARD D. BERNSTEIN*
CARTER G. PHILLIPS
KATHERINE L. ADAMS
PAUL A. HEMMERSBAUGH
BRIAN C. KALT
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

**Counsel of Record*

November 15, 1999

(9)

No. 98-7540

In the Supreme Court of the United States

SCOTT LESLIE CARMELL, PETITIONER

v.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS, SECOND DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

VICKI S. MARANI
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

31 pp

QUESTION PRESENTED

Whether the application of a Texas statute at petitioner's trial, which was amended after his crime to permit a conviction of sexual assault to be supported by the uncorroborated testimony of a child-victim (and thus eliminated the prior requirement of corroboration or outcry within six months of the offense), violates the Constitution's Ex Post Facto Clause in Art. I, § 10, Cl. 1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rule: Page

Miscellaneous:

In the Supreme Court of the United States

No. 98-7540

SCOTT LESLIE CARMELL, PETITIONER

v.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS, SECOND DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a state criminal procedure statute, which was amended to remove a requirement that testimony by certain child-victims be corroborated in sex crime prosecutions when the victim had not informed any other person of the offense within six months, can be applied in trials of offenses that were committed before the statute was enacted, consistent with the Ex Post Facto Clause in Art. I, § 10, Cl. 1, of the Constitution. The Constitution also prohibits Congress from passing ex post facto laws, see U.S. Const. Art. I, § 9, Cl. 3. The United States

therefore has a significant interest in the resolution of this case.[1]

STATEMENT

On January 9, 1997, after a jury trial in Texas state court, petitioner was found guilty on two counts of aggravated sexual assault, in violation of Tex. Penal Code Ann. § 22.021(a)(1)(B)(iii) and (2)(B); five counts of sexual assault, in violation of Tex. Penal Code Ann. § 22.011(a)(2)(C); and eight counts of indecency with a child, in violation of Tex. Penal Code Ann. § 21.11 (West 1994). J.A. 2, 22-104; see State C.A. Br. 38-46. Petitioner was sentenced to life imprisonment on the aggravated sexual assault convictions and to concurrent 20-year terms of imprisonment on the remaining convictions. J.A. 2, 3.

1. Petitioner worked as a counselor and represented himself as an expert in counseling victims of incest. J.A. 4. He counseled a woman named Eleanor, an incest survivor, and eventually married her in 1988, becoming stepfather to Eleanor's daughter, K.M. *Ibid.*[2] The evidence at petitioner's trial established that, beginning in 1991, petitioner engaged in various incidents of sexual contact, eventually including sexual intercourse, with K.M. over the course of four years. The first incident occurred in February 1991, when K.M. was 12 years old and in sixth grade. J.A. 10-11; State C.A. Br. 7. The last incident occurred in March 1995, when K.M.

[1] We refer in this brief to the Ex Post Facto Clause applicable to the States. The same principles apply to the counterpart provision applicable to Congress.

[2] We follow the practice of the Court of Appeals and petitioner's counsel (Pet. Br. 3 n.2) of protecting the identity of the victim by referring to her as "K.M." and by not using her mother's surname.

was 15 years old and in tenth grade. Petitioner's criminal conduct ceased at that time because, after the March 1995 incident, K.M. told a friend and then her mother about what petitioner had been doing to her and her mother reported it to the police. J.A. 5; State C.A. Br. 18-19.

Petitioner was charged in a fifteen-count indictment. Each count alleged a separate incident of unlawful sexual contact with K.M. J.A. 13-21. The count directly at issue here[3] is Count VII, which charged that petitioner "on or about the 1st day of June, 1992, * * * did then and there and knowingly cause the sexual organ of [K.M.], a child younger than 17 years of age and not the spouse of the defendant, to contact the sexual organ of the defendant." J.A. 16. K.M. testified at trial that, one day during the summer after seventh grade when her mother was at work, petitioner took her into his bedroom, had both of them undress, pulled K.M. on top of him, and touched her genitals with his erect penis. Jan. 7, 1997 Tr., Vol. 9, at 111-112. That testimony established the elements of sexual assault, in violation of Tex. Penal Code Ann. § 22.011(a)(2)(C) (West 1994), which makes it a crime for a person to "intentionally or knowingly * * * cause[ ] the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of

[3] The Court's grant of certiorari in this case was "limited to Question 1 presented by the petition." 119 S. Ct. 2336. The *pro se* petition asserted the argument identified by the first question presented as grounds for invalidating only Count VII. See Pet. i, 4-7. Other of petitioner's convictions are also susceptible to the same legal challenge, however. See Br. in Opp. 4 n.3; Carmell C.A. Supp. Br. 1-4; Pet. Br. 4-7 (contending that Counts VIII, IX, and X are invalid for same reasons as Count VII). The court of appeals summarily rejected the claims based on other counts because of its rejection of the claim involving Count VII. J.A. 8-9 n.5.

another person, including the actor." Petitioner was convicted on Count VII as well as the other counts. J.A. 22-104.

2. a. The Texas Court of Appeals affirmed. J.A. 1-12. The court rejected petitioner's claim that the evidence was "legally insufficient" to support his conviction on Count VII, because the law in effect at the time of petitioner's offense required that the victim's testimony be corroborated if she had not told anyone about the offense within six months, and (in his view) there was no such corroboration. J.A. 7-8. The court of appeals rejected that claim, finding that the statute had been amended to eliminate the corroboration requirement and that, because the statute was a "rule of procedure," it applied to petitioner's trial.[4]

Under the version of Texas Code of Criminal Procedure Article 38.07 in effect at the time of the June 1992 sexual assault, a conviction for sexual assault under Texas Penal Code Section 22.011 was supportable on the uncorroborated testimony of the victim if the victim was younger than 14 years of age at the time of the offense. If the victim was 14 years old or older, however, the victim's uncorroborated testimony could support a conviction only if he or she had informed another person, other than the defendant, about the offense within six months of the date on which the offense was alleged to have occurred (the outcry pro-

[4] In his brief in the court of appeals, petitioner argued that the trial court had erred in denying his motion for an instructed verdict on Count VII. Carmell C.A. Br. 11-12 (citing Jan. 8, 1997 Tr., Vol. 10, at 373). Respondent explained to the court of appeals, however, that the referenced motion by petitioner had been limited to Counts I through IV, but that such a motion was not a necessary prerequisite to petitioner's claim on appeal. State C.A. Br. 46 n.6.

vision). J.A. 7-8; Tex. Code Crim. P. Ann. art. 38.07 (West 1992) (reprinted at App., *infra*, 1a). The version of Article 38.07 in effect at the time of petitioner's trial[5] enlarged the group of sexual assault victims whose uncorroborated testimony could support a conviction to include all victims who were under 18 years old at the time of the offense. Tex. Code Crim. P. Ann. art. 38.07 (West Supp. 1999) (reprinted at App., *infra*, la).[6] Thus, under the version of Article 38.07 in effect at the time of petitioner's trial, petitioner's conviction was supportable by the uncorroborated testimony of K.M.

The court of appeals upheld the application of the version of Article 38.07 in effect at the time of petitioner's trial, explaining that it is a rule of procedure and, as such, applies to pending and future prosecutions. J.A. 8 (citing *Zimmerman* v. *State*, 750 S.W.2d 194, 202-202 (Tex. Crim. App. 1988, pet. ref'd)). The court observed that the amended statute "does not increase the punishment nor change the elements of the offense that the State must prove." J.A. 8. Rather, the court stated, Article 38.07, as amended, merely "remove[s] existing restrictions upon the competency of certain classes of persons as witnesses." J.A. 8 (quoting *Hopt* v. *Utah*, 110 U.S. 574, 590 (1884)). The court also noted that there was no showing that the legislature had intended that Article 38.07 not be a rule of pro-

[5] Article 38.07 was amended in 1993. See Act of May 29, 1993, ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765-3766.

[6] Under the amendment, uncorroborated testimony by victims 18 years of age or older at the time of the offense can support a conviction only if the victim informed another person of the offense within one year of the date the offense was committed. See Tex. Code Crim. P. Ann. art. 38.07 (West Supp. 1999); App., *infra*, 1a.

cedure and apply as of the date of the offense. J.A. 8 (citing *Lindquist* v. *State*, 922 S.W.2d 223, 227 n.4 (Tex. App. 1996, pet. ref'd)).[7]

b. On March 26, 1998, the Court of Appeals of Texas denied rehearing. J.A. 3; Pet. App. B. On September 16, 1998, the Court of Criminal Appeals of Texas denied discretionary review. Pet. App. C.

3. On June 14, 1999, this Court granted certiorari "limited to Question 1 presented by the petition." 119 S. Ct. 2336.

SUMMARY OF ARGUMENT

The Ex Post Facto Clause of the Constitution prohibits the enactment of laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990). The authoritative definition of an ex post facto law articulated in *Collins* builds on the standard that this Court adopted in *Beazell* v. *Ohio*, 269 U.S. 167 (1925), and is supported by the Court's modern jurisprudence and by the historical origins of the Ex Post Facto Clause.

Measured against that definition, the application of Article 38.07 of the Texas Code of Criminal Procedure, as amended, does not violate petitioner's rights under

[7] The court of appeals also rejected petitioner's claim that the trial court erred in denying his motion for a new trial based on the State's failure to disclose allegedly impeaching evidence, because the court of appeals ruled that the evidence would not have been admissible as impeachment. J.A. 11-12. And the court of appeals rejected petitioner's claim that the evidence was legally insufficient to support several of the convictions because K.M.'s testimony about petitioner touching her genital area was not specific enough. The court held that K.M.'s testimony was sufficiently specific in each instance to prove conduct that violated the applicable statutory prohibition. J.A. 9-11.

the Ex Post Facto Clause. The statute does not alter the definition of any crime or increase the punishment for any criminal act. Nor does it deprive petitioner of a defense that was available at the time of his crime or prevent him from pleading any excuse or justification for his criminal conduct that was available at the time he engaged in that conduct. Rather, Article 38.07 simply permits the jury to conclude that petitioner engaged in the prohibited conduct on the basis of the testimony of the victim, without additional corroborating evidence. Its effect is thus comparable to many changes in the rules of evidence that affect the nature of the proof from which the jury may conclude that the defendant committed the charged offense.

Petitioner relies heavily on a category of ex post facto analysis described in Justice Chase's opinion in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798): that the Clause applies to "[e]very law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." That description, however, does not conform either to the historic meaning of an ex post facto law or to the definition of such a law that the Court adopted in *Collins* and other cases. Nor are petitioner's policy arguments persuasive. Rather than singling out a particular class of unpopular defendants, the revision of Texas law at issue in this case simply moves the rules governing certain victim testimony back toward conformity with state law governing witness testimony generally. As such, the amended law cannot be denounced as vindictive or arbitrary legislation.

ARGUMENT

A LAW ELIMINATING A REQUIREMENT OF VICTIM CORROBORATION, WITHOUT CHANGING THE NATURE OF THE PROHIBITED CONDUCT OR THE PUNISHMENT FOR THE CRIME, DOES NOT IMPLICATE THE PROHIBITIONS OF THE EX POST FACTO CLAUSE

A. Procedural Changes That Do Not Retroactively Change The Definition Of A Crime Or Increase The Punishment For A Criminal Act Are Not Ex Post Facto Laws

1. a. The Ex Post Facto Clause of the Constitution prohibits the enactment of laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990). In *Collins*, this Court examined its cases construing the Clause and expressly disavowed language in some earlier precedents indicating that the constitutional restriction extended to any retroactive law that deprives an accused of a "substantial protection" under the law existing at the time of his crime. See *Id.* at 44-46.[8] The Court explained that, while a law does not escape ex post facto scrutiny simply by virtue of being labeled "procedural," *id.* at 46, procedural changes that do not make innocent acts criminal or increase punishment do not offend the Clause even when they disadvantage a defendant in other ways. *Id.* at 49-52.

The Court in *Collins* began its analysis by quoting language from Justice Chase's "now familiar opinion" in

[8] Petitioner is, therefore, in error when he argues that "[t]he touchstone for *ex post facto* purposes is whether the change affects substantive rights." Pet. Br. 11.

Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), that "expounded those legislative Acts which in his view implicated the core concern of the *Ex Post Facto* Clause." *Collins*, 497 U.S. at 41-42:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

3 U.S. (3 Dall.) at 390 (opinion of Chase, J.). While the *Collins* Court noted that early opinions of this Court described Justice Chase's formulation as the "exclusive definition of ex post facto laws," *id.* at 42, the definitive modern summary of the scope of the Ex Post Facto Clause was announced in *Beazell* v. *Ohio*, 269 U.S. 167 (1925):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense

> available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Collins, 497 U.S. at 42 (quoting *Beazell*, 269 U.S. at 169-170)). *Collins* added that the *Beazell* formulation was "faithful to the use of the term '*ex post facto* law' at the time the Constitution was adopted" and conforms "to our best knowledge of the original understanding of the *Ex Post Facto* Clause." 497 U.S. at 43, 44.

The *Beazell* definition, announced by Justice Stone for a unanimous Court, differs from Justice Chases's list in two important respects. First, the Court in *Beazell* specifically included within the sweep of the Ex Post Facto Clause statutes that "deprive[] one charged with crime of any defense available according to law at the time when the act was committed." As the Court explained in *Collins*, Justice Stone's inclusion of that category did not expand the historic scope of the ex post facto prohibition, but rather is consistent with the focus of the Clause on retroactive changes in the definition and punishment of crimes. The *Collins* Court explained that "[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done," thus altering the definition of a crime or increasing a punishment. 497 U.S. at 49.

Second, the Court in *Beazell* omitted Justice Chase's fourth category pertaining to laws that "alter[] the *legal* rules of *evidence*." The *Beazell* Court acknowledged that its omission was deliberate: "[e]xpressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure." 269 U.S. at 170 (citing *Calder*, 3 U.S. (3 Dall.) at 390; *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 326 (1866); and *Kring* v. *Missouri*, 107 U.S. 221, 228, 232 (1883)). But, the Court in *Beazell* observed, it was "well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." 269 U.S. at 170.[9]

The Court in *Collins* expressly recognized that "[t]he *Beazell* definition omits the reference by Justice Chase in *Calder* * * * to alterations in the 'legal rules of evidence.'" 497 U.S. at 43 n.3. The Court approved of that omission, however, explaining that "cases subsequent to *Calder* make clear" that "this language was

---

[9] The Court's observation that Justice Chase's fourth category did not represent an accurate portrayal of the scope of the ex post facto prohibition was foreshadowed in the Court's opinion in *Thompson* v. *Missouri*, 171 U.S. 380 (1898). There, the Court acknowledged that there was "apparent support" "in the general language used in some opinions," including Justice Chase's fourth category, for the defendant's position. 171 U.S. at 382. The defendant there challenged, as ex post facto, application at his retrial of a newly enacted law rendering admissible certain writings which the Missouri Supreme Court, on direct appeal from the defendant's first trial, had ruled inadmissible. See *id.* at 381-382. The Court ultimately upheld application of the new law, however, emphasizing that the Court had "[a]ppl[ied] the principles announced in former cases—without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined." *Id.* at 382, 386. And, as one court has noted, although this Court has cited the *Calder* dictum about altering the "legal rules of evidence" in various opinions, the Court "has never actually applied it to invalidate a retrospective change in an evidentiary rule." *State* v. *Hudy*, 535 N.E.2d 250, 256 (N.Y. 1988) (citing Derek J.T. Adler, Note, *Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 Fordham L. Rev. 1191 (1987)).

not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." *Ibid.* (citing *Thompson* v. *Missouri*, 171 U.S. 380, 386-387 (1898); *Hopt* v. *Utah*, 110 U.S. 574, 588-590 (1884)).

Thus, far from endorsing Justice Chase's original fourth category (see Pet. Br. 10, 19-20, 22, 23, 28-29; see also Br. Amicus Curiae for Nat'l Ass'n of Criminal Defense Lawyers 2-10), this Court in *Collins* recognized, consistent with the holdings and analysis of later cases, that Justice Chase's language was overbroad. A correct understanding of ex post facto principles protects against retroactive changes in the scope of the prohibited conduct, and retroactive increases in punishment. It does not apply to evidentiary changes that affect procedural matters, such as how a crime is proved.

b. Subsequent decisions of this Court have adhered to *Collins*' holding that the Ex Post Facto Clause bars the application of new evidentiary or procedural rules only if they redefine a crime or increase a penalty. In *California Dep't of Corrections* v. *Morales*, 514 U.S. 499 (1995), the Court declined to rely on earlier precedent suggesting that the ex post facto prohibition extended to legislative changes that produced "some ambiguous sort of 'disadvantage.'" *Id.* at 506 n.3. The Court declared that, instead, "[a]fter *Collins*, the focus of the *ex post facto* inquiry is * * * on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Ibid.* In *Lynce* v. *Mathis*, 519 U.S. 433 (1997), the Court cited earlier ex post facto cases, including *Calder*, but similarly recognized that, "[t]o fall within the *ex post facto* prohibition," a law must disadvantage a criminal defendant "by altering the definition of criminal conduct or increasing the punishment for the crime." *Id.* at 441 (citing *Collins*); see also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) ("While we have strictly construed the *Ex Post Facto* Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case." (citing, inter alia, *Collins* and *Beazell*)).[10]

2. The Court's conclusion in *Collins* that the ex post facto prohibition does not apply to evidentiary rules unless they alter the definition of a crime or increase a penalty is strongly supported by a re-examination of Justice Chase's opinion in *Calder* and consideration of the original intent of the Framers.

a. *Calder* was a civil case. The issue was whether a statute that granted a new hearing in a probate case, after the case had become final on direct appeal and where there was no statutory mechanism for securing a new hearing before the Court of Probate, constituted an impermissible ex post facto law. The Court held that the constitutional prohibition against ex post facto laws

---

[10] Consistent with the view that *Calder* does not bar the application of a change in an evidentiary or procedural rule to the trial of crimes committed before the change, this Court regularly includes in its orders amending the Federal Rules, including the Federal Rules of Evidence and the Federal Rules of Criminal Procedure, a directive that the amendment is to take effect on a particular day "and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." See, *e.g.*, Order Amending Federal Rules of Evidence, 523 U.S. 1237 (1998); Order Amending Federal Rules of Evidence, 520 U.S. 1325 (1997); Order Amending Federal Rules of Criminal Procedure, 523 U.S. 1229 (1998); Order Amending Federal Rules of Criminal Procedure, 520 U.S. 1315 (1997).

applies only to criminal legislation, not to civil statutes. There was no opinion for the Court; rather, the Justices issued separate opinions seriatim, each expressing a different rationale.[11]

Justice Chase grounded his understanding of an ex post facto law in history. He explained that the Constitution's prohibition of such laws "very probably arose from the knowledge, that *the Parliament of Great Britain* claimed and exercised a power to pass *such laws*, under the denomination of *bills of attainder*, or *bills of pains and penalties*; the *first* inflicting *capital*, the other *less*, punishment." 3 U.S. (3 Dall.) at 389. He then described the varieties of such laws and their origin in "ambition [of their proponents], or personal resentment, and vindictive malice," and concluded that "[t]o prevent such, and similar acts of violence and injustice, I believe, the Federal and State legislatures, were prohibited from passing any bill of *attainder*; or any *ex post facto law*." *Ibid.*

That background, and the historical examples that Justice Chase gave of the practices intended to be prohibited, forms the basis for understanding the fourth category of ex post facto laws the Justice described. Each of the categories of laws listed by Justice Chase as a type of ex post facto law responded directly to problems caused by unjust British laws that he had discussed earlier in his opinion. See 3 U.S. (3 Dall.) at 389. His fourth category, covering any law that "alters the *legal* rules of *evidence*, and receives less, or

[11] Justices Chase (3 U.S. (3 Dall.) at 386-395), Paterson (*id.* at 395-397) and Iredell (*id.* at 397-400) filed separate opinions analyzing the relevant issues; Justice Cushing filed a two-sentence opinion agreeing that the judgment should be affirmed (*id.* at 400-401). The Chief Justice did not participate. *Id.* at 386.

different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*," recalled his condemnation of laws passed by the British Parliament that "violated the rules of evidence (to supply a deficiency of legal proof) by admitting *one* witness, when the *existing* law required two." *Ibid.* The footnote accompanying that discussion cited the "case of Sir John Fenwick, in 1696." *Id.* at 389 n.†.

Fenwick's case involved a bill of attainder that Parliament passed to summarily convict Fenwick of high treason, without a trial and without a second witness as would have been required at a trial under the then-existing law.[12] The bill of attainder thus "altere[d] the legal rules of evidence" only "to convict the offender," Fenwick. See *Calder*, 3 U.S. (3 Dall.) at 390; see also *id.* at 391 (deeming ex post facto, inter alia, laws that "change the rules of evidence, *for the purpose of conviction*"). The law did not alter the rules of evidence generally to apply thenceforth to any other offender, nor did it respond to a general legislative determination about the weight juries should be permitted to give to the testimony of a class of victims. Thus, Justice Chase's fourth category appears to have been intended to apply only to laws that alter the rules of evidence to convict a particular, named offender—a legislative act that may appear implausible today, but that was still considered a threat at the time of *Calder*.[13]

[12] Fenwick had been indicted on the testimony of two witnesses but, after indictment, he managed to bribe one of the witnesses to abscond. See Zechariah Chafee, *Three Human Rights in the Constitution* 133-135 (1956); see generally 4 Thomas Macaulay, *History of England* 663-694 (1860); Adler, *supra*, at 1211 n.113.

[13] It was not until 1798 that the last bill of attainder was enacted by the British Parliament. Chafee, *supra*, at 98.

That interpretation of Justice Chase's opinion is consistent with his statement that he viewed ex post facto laws "precisely in the *same* light" as Sir William Blackstone. 3 U.S. (3 Dall.) at 391. Blackstone's definition of ex post facto laws was limited, along the lines of *Collins*, to laws that are enacted "*after* an action is committed," where "the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." 1 William Blackstone, *Commentaries on the Laws of England* 46 (1765). Therefore, Justice Chase apparently did not intend to extend the scope of the Ex Post Facto Clause to evidentiary rules generally.

The opinions by the other Members of the Court in *Calder* further support that narrow interpretation of Justice Chase's fourth category. Justice Paterson relied on Blackstone's definition, 3 U.S. (3 Dall.) at 396, and emphasized that ex post facto laws "are restricted in legal estimation to the creation, and, perhaps, enhancement of crimes, pains and penalties." *Id.* at 397. Justice Paterson also cited the ex post facto clauses that had been included in early state constitutions, as did Justice Chase. Those clauses were limited to laws that change definitions of crimes or alter punishments. See *id.* at 391-392. In another separate opinion, Justice Iredell, a "leading Federalist who had guided the Constitution to ratification in North Carolina," *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 223 (1995), similarly limited his interpretation of the Ex Post Facto Clause to a prohibition that legislatures "not inflict a punishment for any act, which was innocent at the time it was committed; nor increase the degree of punishment previously denounced for any specific offence." 3 U.S. (3 Dall.) at 400.

Thus, read in light of the historical backdrop of Justice Chase's opinion and the separate views of the other Justices, the list of ex post facto laws described in Justice Chase's opinion in *Calder* was accurately understood by *Collins* not to bar application of evidentiary rule changes unless they change the definition of a crime or increase the punishment.

b. That conclusion also best reflects the Framers' intent. In the course of their discussion of the Ex Post Facto Clauses, the Framers specifically referred to Blackstone's Commentaries, see 2 *The Records of the Federal Convention of 1787*, at 448 (Max Farrand ed., Yale Univ. Press 1966) (*Federal Convention*), as well as the ex post facto clauses contained in early state constitutions, see 2 *Federal Convention* 376. See also *Collins*, 497 U.S. at 43-44 (ex post facto clauses in early state constitutions "appear to have been a basis for the Framers' understanding of the provision"). As discussed above, those authorities support *Collins*' restriction of the ex post facto prohibition to laws redefining crimes or increasing punishments.

The debates on the Constitution included some opposition to the Ex Post Facto Clauses, based on the view that they were superfluous because such laws are so obviously invalid. See 2 *Federal Convention* 376; 3 *Federal Convention* 165; see generally Chafee, *supra*, at 94-95. Even opponents, however, expressed the same narrow interpretation of the scope of the Clause: "To say that the legis. shall not pass an ex post facto law is the same as to declare they shall not do a thing contrary to common sense—that they shall not cause that to be a crime which is no crime." 2 *Federal Convention* 379.

The Federalist Papers also defined the Ex Post Facto Clauses in a similar manner. Alexander Hamil-

ton indicated that the prohibition was intended to prevent "[t]he creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law." *The Federalist No. 84*, at 577 (Jacob Cooke ed. 1961); see also *The Federalist No. 44*, at 301 (James Madison) (Jacob Cooke ed. 1961) (referencing ex post facto clauses in early state constitutions).

Thus, petitioner's effort to revive Justice Chase's fourth ex post facto category—and to apply it to procedural rules lifting corroboration requirements that had prevented the jury from relying on victim testimony found to be credible—should be rejected as inconsistent with both the Court's modern jurisprudence and the historical origins of the Ex Post Facto Clause.

B. Application Of Article 38.07 At Petitioner's Trial Did Not Violate The Ex Post Facto Clause

The state law at issue in this case rendered inapplicable a requirement in prior law that a conviction for a sex offense was not supportable based on the testimony by certain child-victims, unless the victim had either told another person about the offense within six months of its commission or unless there was corroborating evidence. The change in the law, allowing the jury to give effect to the victim's testimony alone, neither altered the rules governing petitioner's conduct nor increased the penalty for his offense, but instead regulated procedures governing his trial. As such, application of the law to petitioner's pre-amendment conduct did not violate the Ex Post Facto Clause.

1. a. Article 38.07 of the Texas Code of Criminal Procedure, as amended in 1993, does not "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins*, 497 U.S. at 43. Both before and after the amendment, Texas law proscribed the same conduct by petitioner and set the same punishment for it; the amendment does not change the standards for determining whether petitioner's conduct was prohibited or what punishment could be imposed. Hence, Article 38.07 it is not an invalid ex post facto law under *Collins*.

The amendment to Article 38.07 eliminates the requirement of corroboration in certain cases, but the effect of that law is in many ways comparable to a law enabling the jury to rely on, and give probative effect to, evidence that previously it could not have considered in determining whether the defendant committed the charged crime.[14] Laws that enable a jury to consider evidence that had previously been inadmissible have long been understood not to violate the ex post facto prohibition. As the Court explained in *Hopt*:

> Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases

---

[14] Petitioner's characterization (Pet. Br. i, 8, 9, 11, 13, 16, 24, 34) of Article 38.07 as a "two-witness" rule is inaccurate. The statute requires corroboration, which means that there must be some other evidence that "tend[s] to connect the defendant with the commission of the offense." *Zule* v. *State*, 802 S.W.2d 28, 32 (Tex. App. 1990, pet. ref'd). Contrary to petitioner's claim (Pet. Br. 5-6 n.5), the corroboration need not be in the form of eyewitness testimony. "It is not necessary that the corroborative evidence provide independent evidence of guilt sufficient to support the conviction." *Ibid.* Circumstantial evidence may suffice. *Ibid.* In any event, even traditional "two-witness" rules have been interpreted to allow proof in a form other than a second witness. See *Hammer* v. *United States*, 271 U.S. 620, 627 (1926) (two-witness rule for perjury prosecution may be satisfied by single witness and sufficient corroboration in the form of documentary proof and circumstantial evidence).

> are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

110 U.S. at 589.

Contrary to petitioner's repeated assertions (Pet. Br. 9, 12, 13, 18, 25, 26-28, 31, 33), Article 38.07 does not reduce the amount of proof necessary to support a conviction, nor did it "change [] the substantive criminal law of Texas" (*id.* at 31). Both before and after the amendment to Article 38.07, the State of Texas bore the burden of establishing petitioner's guilt of the charged offense by proving each of the elements of the offense beyond a reasonable doubt. Article 38.07 affects only the manner of proving facts that are already elements of the crime.

Moreover, Article 38.07 leaves "unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible." *Thompson* v. *Missouri*, 171 U.S. at 387. The defendant remains free to challenge the credibility of the witness on cross-examination and through other evidence, and the jury remains charged with the responsibility to assess the witness's credibility. The amendment is thus similar in effect to a law that does "nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the

ultimate, essential fact to be established, namely, the guilt of the accused." *Ibid.* A law such as that, which "only remove[s] existing restrictions upon the competency of certain classes of persons as witnesses, relates to modes of procedures only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged." *Hopt*, 110 U.S. at 590. See also *Splawn* v. *California*, 431 U.S. 595, 600-601 (1977) (finding it unnecessary to adjudicate ex post facto challenge to retroactively applied instruction claimed to permit consideration of previously inadmissible evidence, but noting that instruction statute "does not create any new substantive offense, but merely declares what type of evidence may be received and considered").[15]

---

[15] Lower courts have rejected other ex post facto challenges to new rules disadvantaging defendants by rendering admissible previously inadmissible evidence including, for example, victim impact evidence in capital sentencing proceedings (see *Mitchell* v. *State*, 884 P.2d 1186, 1203-1204 (Okla. Crim. App. 1994), and certain blood alcohol readings (see *People* v. *Kotecki*, 666 N.E.2d 37 (Ill. App. Ct. 1996)). Lower courts have also rejected ex post facto challenges to new rules disadvantaging defendants by rendering inadmissible previously admissible evidence including, for example, evidence of a rape victim's past sexual conduct (see *People* v. *Dorff*, 396 N.E.2d 827, 830 (Ill. App. Ct. 1979) (rejecting ex post facto challenge to rape shield law); *Finney* v. *State*, 385 N.E.2d 477, 480-481 (Ind. Ct. App. 1979) (same); *Turley* v. *State*, 356 So.2d 1238, 1243-1244 (1978) (same); *People* v. *Mandel*, 61 A.D.2d 563 (N.Y. App. Div. 1978), rev'd on other grounds, 401 N.E.2d 185 (N.Y. 1979) (same); see also *Commonwealth* v. *Edgerly*, 435 N.E.2d 641, 644-645 & n.3 (Mass. App. Ct. 1982)

b. Article 38.07 does not deprive petitioner of an "absolute defense available at the time of his conduct," as he claims. Pet. Br. 10; see also *id.* at 11, 13, 29-30, 31-32. At the time of petitioner's crime, he did not have a defense based on Article 38.07. Petitioner could not have known whether K.M. would report the sexual assault to someone else within six months. If K.M. had met the 6-month statutory outcry provision, her uncorroborated testimony would have been sufficient even under the version of Article 38.07 in effect at the time of petitioner's crime.

The Court should reject petitioner's reliance on *Beazell*'s statement that a law that "deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." 269 U.S. at 169-170. The Court made clear in *Collins* that the term "defense," as used in *Beazell*'s ex post facto definition, "was linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.'" *Collins*, 497 U.S. at 50 (quoting *Beazell*, 269 U.S. at 169-170); see also 497 U.S. at 49 ("[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the

(noting that no cases were found in which a court had held any rape-shield law unconstitutional under Ex Post Facto Clause)), and evidence of an expert witness's opinion that a defendant did not have the mental state that constituted an element of the charged offense (see *United States* v. *Bartlett*, 856 F.2d 1071, 1077 n.7 (8th Cir. 1988) (rejecting ex post facto challenge to change in Federal Rule of Evidence 704(b)); *United States* v. *Alexander*, 805 F.2d 1458, 1462 (11th Cir. 1986) (same); *United States* v. *Mest*, 789 F.2d 1069, 1071-1073 (4th Cir.), cert. denied, 479 U.S. 846 (1986) (same); *United States* v. *Prickett*, 790 F.2d 35, 37 (6th Cir. 1986) (same)).

act is done."). Where, as here, the law "ha[s] not changed * * * the matters which might be pleaded as an excuse or justification for the conduct underlying [the] charge," *id.* at 50, it has not deprived petitioner of a defense within the meaning of *Beazell* or *Collins*.[16]

2. Article 38.07 is not invalid under the Ex Post Facto Clause as a vindictive or arbitrary law enacted "to convict a class of unpopular defendants," as petitioner contends. Pet. Br. 9, 14; see also *id.* at 17, 18, 20.[17]

[16] The Texas Penal Code clearly identifies the affirmative defenses to a charge of sexual assault in violation of Section 22.011. See Tex. Penal Code Ann. § 22.011(d) (West 1994) ("[i]t is a defense to prosecution under Subsection (a)(2) that the conduct consisted of medical care for the child and did not include any contact between the anus or sexual organ of the child and the mouth, anus, or sexual organ of the actor or a third party"); *id.* § 22.011(e) (West 1994) ("[i]t is an affirmative defense to prosecution under Subsection (a)(2) that the actor was not more than three years older than the victim, and the victim was a child of 14 years of age or older").

[17] Petitioner notes (Br. 17 n.9) that prevention of arbitrary and vindictive legislation is not the only purpose served by the ex post facto prohibition. The prohibition is also "aimed at a second concern, namely, that legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.'" *Ibid.* (quoting *Miller* v. *Florida*, 482 U.S. 423, 430 (1987), and *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981)). Here, petitioner was given fair warning by Texas law that his conduct was criminal and subject to the punishment that he received. As noted above, because petitioner could not have known, at the time of his crime, whether K.M. would meet the statutory outcry provision, petitioner could not have known whether admission of K.M.'s testimony would be conditioned on corroboration. Thus, there could have been no reliance interest in the procedural rule of Article 38.07. See also *Landgraf*, 511 U.S. at 275 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted

First, Article 38.07 was not enacted "to convict" anyone. Unlike the law that was enacted to convict John Fenwick, which concerned Justice Chase and which changed the rules of evidence only in that particular case to achieve that express purpose, Article 38.07 changes a generally applicable rule of criminal procedure bearing on the sufficiency of uncorroborated testimony by certain witnesses. Second, one of the express purposes of the amendment to Article 38.07 was to bring the law governing minor-age sexual assault victims such as K.M. into line with the generally applicable state law. See House Research Org., Bill Analysis 14 (Mar. 15, 1993) (explaining that amendment to Article 38.07 would eliminate an "artificial barrier," because "[v]ictims in sexual assault cases are no more likely to fantasize or misconstrue the truth than the victims of most other crimes, which do not require corroboration of testimony or previous 'outcry.'"); *ibid.* ("Sexual assault and other sexual offenses are more comparable to crimes such as theft, arson and robbery —none of which require corroboration of the victim's testimony for conviction.").[18] Petitioner's attempt to differentiate Article 38.07 from "neutral rules of general application" (see Pet. Br. 10, 20, 25-26, 32) overlooks that fact.

The reason that Article 38.07's enlargement of the class of victims allowed to testify at trial without corroboration adversely affects only certain defendants is that their cases are the only ones in which former Article 38.07 had altered state law in this manner to

---

after the conduct giving rise to the suit does not make application of the rule at trial retroactive.")

[18] Petitioner lodged a copy of this document with the Clerk of the Court, see Pet. Br. 18.

condition certain victim evidence on corroboration or outcry. That does not render the law invalid. Article 38.07 can hardly be deemed arbitrary or vindictive when it simply is an effort to move the rules governing certain witness testimony toward conformity with state law governing witness testimony generally.

Admittedly, persons convicted of sexual offenses against minor-age children are an unpopular group. But so was the group of persons affected by the law challenged in *California Department of Corrections* v. *Morales*, 514 U.S. 499 (1995)—persons who had been convicted of offenses involving the killing of more than one person. As *Morales* made clear, however, the ex post facto standard does not vary "on the basis of societal animosity." *Id.* at 510-511 n.7. Because Article 38.07 does not alter the definition of a crime or increase a punishment, it does not violate the constitutional prohibition against ex post facto laws.

CONCLUSION

The judgment of the Court of Appeals of Texas should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

VICKI S. MARANI
Attorney

OCTOBER 1999

APPENDIX

1. In June 1992, Article 38.07 of the Texas Code of Criminal Procedure provided:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense. The court shall instruct the jury that the time which lapsed between the alleged offense and the time it was reported shall be considered by the jury only for the purpose of assessing the weight to be given to the testimony of the victim.

Tex. Code Crim. P. Ann. art. 38.07 (West 1992).

2. As amended, effective September 1, 1993, Article 38.07, provides:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 18 years of age at the time of the alleged offense.

Tex. Code Crim. P. Ann. art. 38.07 (West Supp. 1999).

(10)

No. 98-7540

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT L. CARMELL,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Texas, Second District

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Barbara Bergman
Co-Chair, NACDL *Amicus* Committee
The University of New Mexico
School of Law
1117 Stanford NE
Albuquerque, NM 87131-1431
(505) 277-3304

Robert P. Marcovitch
Counsel of Record
Kilpatrick Stockton LLP
Suite 2800
1100 Peachtree Street
Atlanta, GA 30309-4530
(404) 815-6122

Counsel for *Amicus Curiae*
National Association of Criminal Defense Lawyers

17 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of petitioner Scott L. Carmell. Written consents of the parties to the filing of this brief have been submitted to the Court.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

This case presents the issue of when, if ever, the retroactive application of a new rule of evidence violates the

---

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

Ex Post Facto Clause. The NACDL contends that in certain circumstances, where such a retroactive application of an evidentiary rule leads to a conviction that would not otherwise have been obtained but for the rule change, the *Ex Post Facto* Clause has been violated. The NACDL is concerned that if this position is not adopted by this Court, then criminal defendants will be afforded no *ex post facto* protection from retroactively-applied changes to rules of evidence, a result that would be inconsistent with the intent of the Framers.

SUMMARY OF THE ARGUMENT

1. In his opinion in *Calder v. Bull*, 3 U.S. 386 (1798), Justice Chase set forth four categories of *ex post facto* laws that are now enshrined in this Court's *ex post facto* jurisprudence. Recently, in *Collins v. Youngblood*, 497 U.S. 37 (1990), the Court made it clear that *ex post facto* violations are to be measured only by the *Calder* categories, which it viewed to be contemporaneous expressions of the Founders' intent regarding the *Ex Post Facto* Clause.

2. The fourth *Calder* category, which governs the outcome in this case, classifies as an *ex post facto* law: "Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Calder*, 3 U.S. at 390. This fourth category was not meant by Justice Chase to be some useless appendage to the other three categories. Instead, it was designed specifically to independently address the retroactive application of new evidentiary rules. Consistent with some of Justice Chase's discussion in *Calder*, and with the fundamental underpinnings of the *Ex Post Facto* Clause, the fourth *Calder* category

should be interpreted to prevent the retroactive application of a new rule of evidence when it is dispositive as to an ultimate finding of guilt.

ARGUMENT

I. DETERMINATIONS UNDER THE *EX POST FACTO* CLAUSE ARE GOVERNED BY ORIGINAL INTENT AS EVIDENCED BY JUSTICE CHASE'S OPINION IN *CALDER v. BULL*.

A. Introduction: The Four Categories of *Ex Post Facto* Laws.

Justice Chase's opinion in *Calder v. Bull*, 3 U.S. 386, 390 (1792), sets forth four categories of *ex post facto* laws[2] that are now enshrined in this Court's *ex post facto* jurisprudence:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at

[2] The Constitution provides: "No State shall ... pass any ... ex post facto Law...." U.S. CONST. art. I, § 10, cl. 1.

the time of the commission of the offence, in order to convict the offender.

At issue in this case is the continuing viability and meaning of the fourth *Calder* category. As demonstrated below, that category retains significance and should be interpreted to prevent the retroactive application of changes in the rules of evidence in cases where such changes are dispositive as to a defendant's conviction.

B. The Significance of *Collins v. Youngblood.*

In *Collins v. Youngblood*, 497 U.S. 37 (1990), a case involving the retroactive application of a Texas statute allowing for the reformation of an improper verdict that assesses unauthorized punishment, this Court clarified the state of *ex post facto* law and laid the framework for the determination of the issue presented by this case.

After setting forth the *Calder* factors and discussing some of the historical background of the *Ex Post Facto* Clause, the Court in *Collins* noted that the Texas statute under consideration effected a "procedural change" in Texas law. 497 U.S. at 44. The Court continued:

> Several of our cases have described as "procedural" those changes which, even though they work to the disadvantage of the accused, do not violate the *Ex Post Facto* Clause. While these cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as

> opposed to changes in the substantive law of crimes. Respondent correctly notes, however, that we have said that a procedural change may constitute an ex post facto violation if it affects matters of substance, by depriving a defendant of substantial protections with which the existing law surrounds the person accused of crime, or arbitrarily infringing upon substantial personal rights.

Collins, 497 U.S. at 45 (citations, internal quotations and brackets omitted). The Court then commented: "We think this language from the cases cited has imported confusion into the interpretation of the *Ex Post Facto* Clause." *Id.*

Therefore, in order to clarify the perceived confusion as to the meaning of the *Ex Post Facto* Clause, especially as it is implicated by the retroactive application of procedural changes of law, the Court made it clear that *ex post facto* violations are to be measured only by the *Calder* categories.

> We think the best way to make sense out of this discussion in the cases is to say that by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause.... [T]he constitutional prohibition is addressed to laws, whatever their form, which make innocent acts criminal, alter the nature of the offense, or increase the punishment. <u>But the prohibition which may not be evaded is the one defined by the *Calder* categories</u>.

Id. at 46 (citations and internal quotations omitted; emphasis added). Indeed, the Court in *Collins* unmistakably viewed the *Calder* factors as embodying the intent of the Founders. *See id.* at 50 (overruling *Kring v. Missouri*, 107 U.S. 221 (1883), "The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which 'alters the situation of a party to his disadvantage.' We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases.").

Therefore, there can be no question that the outcome of this case is dictated by the four *Calder* categories, and in particular, the fourth such category. Although, as discussed below, the viability of the fourth category in the circumstances of this case has been called into question, the original intent of the Framers, as evidenced by Justice Chase's opinion in *Calder*, was that the *Ex Post Facto* Clause should be applied to prevent convictions obtained as a direct result of the retroactive application of a new or changed rule of evidence.

II. UNDER THE FOURTH CATEGORY OF *CALDER V. BULL*, THE RETROACTIVE APPLICATION OF A NEW RULE OF EVIDENCE THAT IS DISPOSITIVE AS TO A FINDING OF GUILT IS PROHIBITED.

A. The Viability of the Fourth *Calder* Category.

On its face, the fourth *Calder* category -- "Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender" -- applies in this case. The 1993 amendment to Article 38.07 of the Texas Code of Criminal Procedure, retroactively applied by the Texas trial court in this case, enabled the jury to hear uncorroborated testimony of K.M. that otherwise would have been prohibited under the version of that statute extant at the time of the June 1992 offense at issue here. There can be little question that Petitioner would not have been convicted of that offense but for the testimony of K.M. Consequently, the 1993 amendment "alter[ed] the legal rules of evidence, and [allowed for] ... different testimony [*i.e.* the uncorroborated testimony of K.M.] than the law required at the time of the commission of the offence, in order to convict the ... [Petitioner]."

However, in a footnote in *Collins*, *supra*, this Court called into question the viability of the fourth *Calder* factor: "The *Beazell* [*v. Ohio*, 269 U.S. 167 (1925)] definition [of the meaning of the *Ex Post Facto* Clause] omits the reference by Justice Chase in *Calder v. Bull* to alterations in the 'legal rules of evidence.' As cases subsequent to *Calder* make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." *Collins*, 497 U.S. at 43 n.3 (citations omitted).[3]

---

[3] In *Beazell*, this Court summarized the meaning of the *Ex Post Facto* Clause as follows:

> It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at

Nevertheless, in light of (1) the Court's decision in *Collins v. Youngblood*, as discussed above, requiring the determination of all alleged *ex post facto* violations by measurement against the *Calder* categories, and (2) the fact that the fourth *Calder* category had independent significance at the time of the *Calder* decision, footnote 3 of *Collins* should not be read as blanket authority for the retroactive application of new rules of evidence. Instead, consistent with the tenor of *Collins*, and to preserve some viability of the fourth *Calder* category, that footnote should be interpreted simply to mean that the fourth category "was not intended to prohibit [in every circumstance] the application of new evidentiary rules in trials for crimes committed before the changes." *Collins*, 497 U.S. at 43 n.3.

The fourth *Calder* category was not devoid of meaning at the time that it was first discussed in *Calder*. Indeed, Justice Chase, in addressing the historical background of the *Ex Post Facto* Clause, expressly discussed historical examples of *ex post facto* changes in evidentiary rules:

> The prohibition against their [*i.e.* the state legislatures'] making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws.... Sometimes they respected the crime, by declaring acts to be treason, which were not

---

the time when the act was committed, is prohibited as *ex post facto*.

269 U.S. at 169-70.

> treason, when committed, at other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit.

Calder, 3 U.S. at 389 (footnotes deleted; emphasis added). Justice Chase went on to state that it was "[t]o prevent such, and similar, acts of violence and injustice, ... [that] the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any *ex post facto* law." *Id.*

Therefore, it is clear that the fourth *Calder* category was not meant by Justice Chase to be some useless appendage to the other three categories. Instead, the fourth category was designed specifically to independently address the retroactive application of new evidentiary rules. Accordingly, because *Collins* expressly pegs *ex post facto* violations to the *Calder* categories, and because the fourth category applicable here had independent meaning when it was first set forth, that category must retain viability.

B. The Meaning of the Fourth *Calder* Category.

The question remains: what is the meaning of the fourth *Calder* category? Although Justice Chase did not provide a definitive analysis, he did provide indications that the meaning of that category is that which is urged in this brief: that a retroactive application of a rule of evidence that is dispositive regarding an ultimate finding of guilt violates the

Ex Post Facto Clause. First, synopsized, the very words of the fourth category prevent the retroactive application of any "law that alters the legal rules of evidence ... in order to convict the offender." *Calder*, 3 U.S. at 390 (emphasis added). Moreover, Justice Chase also wrote: "I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction." *See also* Derek J.T. Adler, *Ex Post Facto Limitations in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 Fordham L. Rev. 1191, 1211 (1987) ("An evidentiary change may also run afoul of the *ex post facto* prohibition if it increases the likelihood of conviction to such an extent as virtually to guarantee it.").[4]

Thus, in the ordinary course, as suggested in footnote 3 of *Collins*, a simple change in a rule of evidence will not, in the vast majority of cases, violate the *Ex Post Facto* Clause. The rules prescribing the methods and means of the presentation of evidence rarely have a direct influence on the outcome in a criminal case. However, when a change of such a rule is dispositive as to a finding of guilt, that change is qualitatively different from an ordinary evidentiary rule change. Fundamentally, whether it is applied to a change of substantive law or of a law of evidence, the *Ex Post Facto*

[4] Cases of this Court upholding the retroactive application of a change in an evidentiary rule are not inconsistent with the rule proposed here. *See Hopt v. Utah*, 110 U.S. 574 (1884) (change of rule newly authorizing the admission of testimony of felons); *Thompson v. Missouri*, 171 U.S. 380 (1898) (changing rule to authorize admission of handwriting exemplars). Although they are silent on the point, neither *Hopt* nor *Thompson* suggests that the changes of evidentiary rules at issue were dispositive as to conviction.

Clause is designed to prevent convictions and increases in punishment based on the retroactive application of such changes. In essence, the *Ex Post Facto* Clause is an adjunct to the Due Process Clause in that it constitutionalizes a rule of fairness. *See Calder*, 3 U.S. at 389 (the *Ex Post Facto* Clause is designed "[t]o prevent such, and similar, acts of violence and injustice") (emphasis added), and at 390 (referring to the four categories of *ex post facto* laws, Justice Chase stated: "All these, and similar laws, are manifestly unjust and oppressive.") (emphasis added). And there should be no constitutional difference between a conviction achieved through a retroactively-applied change of the elements of an offense and one obtained through a retroactively-applied change of a rule of evidence -- the result is the same: a conviction that would not have been obtained under the law prevailing at the time of the conduct in question.

The rule proposed here is not some amorphous standard of fairness. Instead, it would measure challenges to retroactive applications of changes in rules of evidence by the significance of the effect that those changes had on the ultimate outcome: conviction. Therefore, if the proposed rule were adopted by this Court, then courts would be required simply to employ a test that mirrors the time-honored harmless error test used by the Courts of Appeals every day to determine the significance of errors committed in criminal cases. *See* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *Chapman v. California*, 386 U.S. 18, 24 (1967) (error is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). Courts of Appeals regularly make determinations under the harmless error rule as to the prejudicial nature of erroneously admitted evidence,

and there is no reason why they cannot perform a similar task in evaluating the constitutional significance of retroactively-applied rules of evidence.

CONCLUSION

The judgment of the Court of Appeals of Texas, Second District, should be reversed.

Respectfully submitted,

ROBERT P. MARCOVITCH
Counsel of Record
Kilpatrick Stockton LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
(404) 815-6122

BARBARA BERGMAN
Co-Chair, NACDL *Amicus* Committee
The University of New Mexico
School of Law
1117 Stanford NE
Albuquerque, NM 87131-1431
(505) 277-3304

September 1999

(11)

7540

No. 98-~~7450~~

IN THE

Supreme Court of the United States

SCOTT LESLIE CARMELL,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Appeals

BRIEF OF THE *AMICI* STATES IN SUPPORT OF TEXAS

CARLA J. STOVALL
Kansas Attorney General
STEPHEN R. MCALLISTER
Kansas State Solicitor
(Counsel of Record)
301 S.W. 10th Avenue
Topeka, Kansas 66612
(785) 296-2215

Counsel for the Amici States

[Additional Counsel Listed After Conclusion]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTERESTS OF THE *AMICI* STATES

The States have a substantial interest in the interpretation and application of the *Ex Post Facto* Clause of Article I, section 10 of the Constitution. Properly understood, the constitutional *ex post facto* prohibition prevents States from retroactively (1) applying new crimes, (2) eliminating affirmative defenses, or (3) increasing the punishments for crimes. But, as in this case, the States nonetheless have been confronted with *ex post facto* claims when the States have changed virtually any rule of evidence, criminal procedure, prison administration, or the statutes of limitation that apply to various offenses. This case presents the Court with an opportunity to clarify whether the constitutional *ex post facto* prohibition applies at all to changes in the States' laws that do not fall within the three traditional *ex post facto* categories. This issue arises with some frequency in litigation initiated against the States, particularly as the volume of prisoner suits has grown over the years.

SUMMARY OF THE ARGUMENT

The Court's decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), establishes that the *Ex Post Facto* Clauses in the Constitution apply only to retroactive changes that either (1) alter the elements of a criminal offense, (2) eliminate an affirmative defense, or (3) increase the punishment for an offense. *Collins* and other decisions of the Court make clear that the fourth category of *ex post facto* laws that Justice Chase identified in *Calder v. Bull*, 3 Dall. 386, 390 (1798)—changes in evidentiary rules that permit conviction on the basis of less testimony—has no legal significance independent of the three traditional categories. Indeed, there is no reason to give Justice Chase's fourth category any separate legal significance, because the concerns raised by retroactive changes in evidentiary rules are addressed by several other constitutional provisions and doctrines, such as general procedural due process principles, the right to confront witnesses, the right to

compulsory process, and the prohibition against bills of attainder.

Nor is there any merit to petitioner's suggestion that a change in an evidentiary rule can deprive him of a "defense" for *ex post facto* purposes. Only *affirmative* defenses that amount to legal *excuses or justification* for otherwise criminal conduct are "defenses" for *ex post facto* purposes. Thus, situations such as insufficient evidence of the crime, the incompetency of a witness, the scientific unreliability of evidence, or the existence of a statute of limitations are not "defenses" within the contemplation of the constitutional prohibitions on *ex post facto* legislation.

Petitioner's *ex post facto* claim must fail because the 1993 amendment to the Texas statute did not (1) alter the elements of an offense, (2) eliminate an affirmative defense, or (3) increase the punishment for an offense. Instead, the substantive criminal law of Texas has remained unchanged with respect to the sexual offenses for which petitioner was convicted.

ARGUMENT

I. THE 1993 AMENDMENT TO THE TEXAS "OUTCRY" STATUTE DID NOT CHANGE ANY ELEMENTS OF AN OFFENSE, ELIMINATE AN AFFIRMATIVE DEFENSE, NOR INCREASE THE PUNISHMENT FOR AN OFFENSE

A. Constitutional *Ex Post Facto* Prohibitions Do Not Apply To Changes In Procedural Rules That Do Not Alter The Elements Of An Offense, Eliminate An Affirmative Defense, Nor Increase The Punishment For An Offense

1. This Court Already Has Rejected The Proposition That The Fourth *Calder v. Bull* Category Of *Ex Post Facto* Legislation Has Legal Significance Independent Of The First Three Categories

This Court's decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), establishes that the fourth *ex post facto* category that Justice Chase identified in *Calder v. Bull*, 3 Dall. 386 (1798) (opinion of Chase, J.)[1]—the only category on which the petitioner relies in this case—has no legal effect independent of the first three categories. Thus, the Texas statutory amendment at issue in this case cannot violate the *ex post facto* prohibition unless it either (1) defines a new crime, (2) aggravates the seriousness of a crime by, for example,

---

[1] Justice Chase identified four situations that, in his view, would contravene the constitutional *ex post facto* prohibition: (1) a "law that makes an action done before the passing of the law, and which was innocent when done, criminal"; (2) a "law that aggravates a crime, or makes it greater than it was, when committed"; (3) a "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"; and (4) a "law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." 3 Dall. 386, 390 (opinion of Chase, J.).

eliminating an affirmative defense, or (3) increases the punishment for a crime, none of which it does.

In *Collins*, this Court addressed a sex offender's claim that a new statute permitting an appellate court to reform an otherwise improper verdict (rather than require a new trial of the case) could not be applied retroactively. The Court unanimously rejected the sex offender's *ex post facto* claim. In doing so, the majority opinion disavowed any notion that Justice Chase's fourth category—retroactive changes in the rules of evidence—has any legal meaning or significance independent of the first three categories.

In his opinion for the Court, the Chief Justice pointed out that the Court has not endorsed Justice Chase's fourth category. 497 U.S. at 43 n. 3. Instead, the Court has adopted a "definition [that] omits the reference by Justice Chase in *Calder v. Bull* to alterations in the 'legal rules of evidence.' As cases subsequent to *Calder* make clear, *this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes*." 497 U.S. at 43 n. 3 (emphasis added, internal citations omitted). The Court discussed several of those subsequent cases, some of which relied upon a distinction between "procedural" and "substantive" changes in the law, and declared that, in the *ex post facto* context, "it is logical to think that the term ['procedural'] refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Id.* at 45. The Court emphasized that labeling a law "procedural" does not insulate it from *ex post facto* challenge. Rather, the Court held that "the constitutional prohibition is addressed to laws, 'whatever their

form,' which make innocent acts criminal, alter the nature of the offense, or increase the punishment."[2] *Id.* at 46.

In *Collins*, the Court recognized that some of its older *ex post facto* decisions spoke in terms of changes in the law that deprived a defendant of "substantial protections", but the Court used the *Collins* case to expressly disavow such language. 497 U.S. at 45-46. Indeed, the Court overruled two decisions that the Court found inconsistent with the proper historical understanding of the *ex post facto* prohibition. *Id.* at 47-52 (overruling *Kring v. Missouri*, 107 U.S. 221 (1883), and *Thompson v. Utah*, 170 U.S. 343 (1898)). In so doing, the Court clarified that the constitutional *ex post facto* prohibition, as summarized in the *Calder v. Bull* categories, does not prohibit *every* "change which 'alters the situation of a party to his disadvantage.'" 497 U.S. at 50. "[S]uch a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases." *Id.*

Thus, even though the Texas statute at issue in *Collins* altered the law in a way that operated to the defendant's disadvantage in that case, the Court found no *ex post facto* violation. Instead, the Court concluded that

> The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the Ex Post Facto Clause of Art. I, § 10.

---

[2] Thus, the States are not contending that a "procedural" change can *never* violate the constitutional *ex post facto* prohibition, but that it is likely to be a rare case in which such a violation occurs.

497 U.S. at 52. With all due respect, applying the same three standards to the Texas "outcry" statute at issue in this case, the only reasonable conclusion is that retroactive application of the 1993 amendment does not contravene *ex post facto* principles.

2. This Court's Decisions Subsequent To *Collins v. Youngblood* Confirm That Constitutional *Ex Post Facto* Prohibitions Are Not Implicated By Every Change In The Law That A Defendant Claims Is Detrimental

Since *Collins*, this Court on several occasions has reiterated the proposition that the *Ex Post Facto* Clause does not prohibit any and all retroactive changes in the law that may "disadvantage" an offender. Thus, in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), the Court declared that "[a]fter *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." 514 U.S. at 506 n. 3. *Cf. Kansas v. Hendricks*, 521 U.S. 346 (1997) (involuntary civil commitment statute that applies to sex offenders is not punitive and therefore does not violate *ex post facto* principles when applied retroactively to convicted sex offenders).

Indeed, this Court has expressly held that "whether a sanction constitutes punishment is not determined from the defendant's perspective." *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 n. 14 (1995). *See also* Harold J. Krent, *The Puzzling Boundary Between Criminal And Civil Retroactive Lawmaking*, 84 Geo. L.J. 2143 (1996). Thus, the mere fact that the 1993 amendment to the Texas statute may not please petitioner does not implicate the constitutional *ex post facto* prohibition. Instead, the questions are whether the Texas statute (1) created a new crime, (2) increased the punishment for the crime, or (3) altered the nature of the crime, for example, by eliminating an affirmative

defense. With all due respect, the 1993 amendment to the Texas statute did none of those things.

B. Other Constitutional Provisions, Such As The Right To Due Process, The Right To Confront Witnesses, The Right To Compulsory Process, And The Prohibition On Bills Of Attainder, Adequately Protect Defendants In The Circumstances Presented Here

Importantly, the Court's decision in *Collins* that the fourth *Calder v. Bull* category has no legal significance independent of the first three categories leaves no gap in the constitutional protection of criminal defendants. Other constitutional provisions adequately protect defendants such as petitioner in the context of changes or amendments to evidentiary or other procedural rules.

To the extent petitioner's complaint goes to the competency of his victim to testify against him, the Constitution already addresses those concerns in other provisions, making resort to the *ex post facto* prohibition unnecessary. Due process principles generally assure fundamental fairness in criminal proceedings. Basic procedural due process principles, for example, limit a State's ability to lower the State's burden of proof in criminal proceedings, *e.g.*, *In re Winship*, 397 U.S. 358 (1970), and some civil proceedings. *E.g.*, *Addington v. Texas*, 441 U.S. 418 (1979).[3] General due process principles also apply to issues concerning the reliability and relevance of evidence. *E.g.*, *Dawson v. Delaware*, 503 U.S. 159 (1992).

---

[3] Thus, in the highly unlikely circumstance that a State enacted a statute that retroactively altered the State's burden of proof for some or all criminal offenses below the requirement of proof beyond a reasonable doubt, such a change would violate due process, whether applied retroactively or prospectively, and there would be no reason to invoke the *ex post facto* prohibition in order to declare the statute unconstitutional.

In addition, the Confrontation Clause of the Sixth Amendment limits the use of hearsay evidence, *see, e.g., Idaho v. Wright*, 497 U.S. 805 (1990), and limits the measures the States may take to shield even very young child witnesses from their alleged molesters. *See, e.g., Coy v. Iowa*, 487 U.S. 1012 (1988). The Compulsory Process Clause of the Sixth Amendment ensures that defendants have the assistance of formal judicial process to compel the presence and testimony of favorable witnesses.

Finally, Article I, § 10, the same provision that declares the *ex post facto* prohibition applicable to the States, also prohibits States from passing any bill of attainder. Thus, if the Texas legislature had amended the statute in order to target petitioner, or perhaps even child molesters generally, for retroactive punishment, the constitutional prohibition on bills of attainder might be implicated.

These substantial constitutional protections are directed more specifically than the *Ex Post Facto* Clause to issues arising from application of the rules of evidence to criminal defendants and the witnesses who may testify against them. Given the existence of these numerous provisions, and the scope of the protections they provide, there is simply no reason to stretch the constitutional *ex post facto* prohibition beyond its historical roots to encompass retroactive changes in rules of evidence that do not (1) create a new offense, (2) alter the nature of an offense, or (3) increase the punishment for an offense.

II. PROCEDURAL RULES DO NOT CREATE "DEFENSES" FOR *EX POST FACTO* PURPOSES

A. Only Rules That Affect The Legal Definition Of An Offense Constitute A "Defense" For *Ex Post Facto* Purposes

Collins v. Youngblood, 497 U.S. 37 (1990), makes clear beyond any doubt that the "defenses" which the *Ex Post Facto* Clause prohibits the States from altering retroactively,[4] are "legal" defenses, not simply any rule or procedure a defendant might invoke to avoid prosecution or conviction. In *Collins*, the Chief Justice expressly declared for the Court that "[a] law that abolishes an *affirmative* defense of *justification or excuse* contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done." 497 U.S. at 49 (emphasis added). Thus, petitioner's argument that the amended Texas statute in this case deprives him of a "defense" for *ex post facto* purposes is completely without merit.

Insufficient proof to support a conviction, the incompetency of a particular witness to testify, the scientific unreliability of particular forensic evidence, or the time constraints imposed by a statute of limitations may be obstacles to the prosecution of a criminal offense in specific cases, but none of those situations amount to "defenses" to prosecution in the sense the *ex post facto* prohibition contemplates. As *Collins* expressly recognizes, for *ex post facto* purposes,

---

[4] Strictly speaking, none of the first three *Calder v. Bull* categories refer to "defenses" at all, but this Court long appears to have recognized that retroactive elimination of an affirmative defense to a crime would create an *ex post facto* problem, apparently because it would "aggravate" the offense (the second *Calder v. Bull* category). *See, e.g., Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925) (a retroactive law "which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*").

"defense" means an *affirmative* defense of "justification or excuse" to criminal liability.

An affirmative defense is one that applies even though the State can prove beyond a reasonable doubt that the defendant committed the offense with which he has been charged. In other words, an affirmative defense is a legal *excuse or justification* for conduct that would otherwise be criminal. These defenses historically have included justifications such as self-defense, defense of others, immunity, privilege, or some other *legal* justification for the defendant's conduct. Affirmative defenses, and thus the "defenses" recognized for *ex post facto* purposes, do not include procedural or evidentiary rules or even statutes of limitation that may, in a particular case, preclude a successful criminal prosecution.

B. The *Ex Post Facto* Clause Does Not Prohibit Changes In Evidentiary Rules

More than 100 years ago, the Court made plain that the *Ex Post Facto* Clause does not prohibit the States from retroactively changing rules of procedure or evidence, including laws that govern the competency of witnesses to testify, like the Texas statute at issue here. In *Hopt v. Utah*, 110 U.S. 574 (1884), the Court rejected an *ex post facto* challenge to a Utah law that changed prior law by permitting convicted felons to testify in criminal proceedings. At the time of the petitioner's crime, the law of Utah forbade convicted felons from testifying in civil or criminal proceedings. But before petitioner's trial, the law was changed to permit felons to testify in criminal proceedings, and a felon previously convicted of murder was then a key witness in the petitioner's trial.

In rejecting the petitioner's *ex post facto* claim in *Hopt*, the Court declared that "[s]tatutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage." 110 U.S. at 589. In

reaching that conclusion, the Court reasoned that such a law did not criminalize a previously innocent act, aggravate any previously existing crime, provide a greater punishment for a crime, nor alter the degree of proof necessary to establish guilt. *Id.* The Court emphasized that evidentiary rules, such as those affecting the competency of witnesses to testify, "relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure." *Id.* at 590.

Similarly, in *Beazell v. Ohio*, 269 U.S. 167 (1925), the Court reiterated that "it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." *Id.* at 170. Furthermore, in *Beazell* the Court emphasized that "the constitutional [*ex post facto*] provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Id.* at 171.

Thus, the 1993 amendment is simply outside the categories of retroactive laws the *Ex Post Facto* Clause prohibits. In essence, petitioner's only complaint is that Texas in 1993 changed the rules regarding the competency of a juvenile witness to testify against him with respect to sexual offenses, a procedural change.[5] The Court's cases make clear that it is not *whether* anyone is adversely affected by a retroactive legislative change but, rather, *how* they are affected that

---

[5] Petitioner also appears to suggest that the 1993 change is suspect because the Texas Legislature did not amend the statute broadly enough to apply to any minor victim of any crime, rather than limiting it to sex offenses. See Brief of Petitioner, Argument I.B. (final paragraph). But the scope of the amendment in that respect has no relevance to an *ex post facto* claim.

determines when a law violates the *ex post facto* prohibition.[6] The only three ways that matter for *ex post facto* purposes are retroactive (1) changes in the definition of an offense, (2) increases in the punishment, or (3) elimination of an affirmative defense, none of which are present in this case.

C. The *Ex Post Facto* Clause Does Not Prohibit Changes In Statutes Of Limitation

Recently, the California Supreme Court applied *Collins v. Youngblood*, 497 U.S. 37 (1990), in the context of an *ex post facto* challenge to a retroactive change in the statute of limitations in a criminal case. That court held, in *People v. Frazer*, 21 Cal.4th 737 (1999), that a retroactive change in the statute of limitations does not implicate *ex post facto* protections.

In California, there is no statute of limitations for a small number of specified offenses. Cal. Pen. Code § 799. Otherwise, felony cases must be commenced either three years or six years after commission of the offense, depending upon the term of imprisonment prescribed for the crime. Cal. Pen. Code §§ 800, 801. Penal Code section 803 sets forth exceptions to these general rules and provides for the tolling or extension of the generally-applicable statutes of limitations.

In 1994, the California legislature added subdivision (g) to section 803 to provide that if an enumerated serious sex offense was committed upon a victim who was a child at the time, and if the normally-applicable statute of limitations had expired, a criminal case could be filed nonetheless if the case was initiated

[6] For this reason, petitioner's reliance upon *Miller v. Florida*, 482 U.S. 423 (1987), is completely misplaced. *See* Brief of Petitioner, Arguments I.C., III. *Miller* is a case in which the *punishment* for the offense increased between the time the defendant committed the offense and the time of sentencing. *Miller* therefore, unlike this case, falls squarely within one of the three traditional *ex post facto* categories.

within one year of the date on which the victim reported the crime to a law enforcement agency and there was independent evidence that clearly and convincingly corroborates the victim's allegation. The legislature subsequently amended the statute to make clear its intent that section 803(g) be applied retroactively so as to permit the prosecution of crimes that were time-barred prior to 1994–the effective date of section 803(g).

In 1996, pursuant to section 803(g), Raymond Frazer was charged with one felony sex offense against a child, which was alleged to have been committed in 1984. He challenged the action, claiming the charge had been time barred in 1990, and retroactive application of the statute to permit his prosecution would violate the *Ex Post Facto* Clauses of the United States and California Constitutions.

The California Supreme Court rejected the claim.[7] The Court began its analysis of the *ex post facto* issue by examining *Beazell v. Ohio*, 269 U.S. 167 (1925) and *Collins v. Youngblood*, 497 U.S. 37 (1990). These cases, the California Supreme Court found, set forth a two-part test: "'Legislatures may not retroactively *alter the definition of crimes* or *increase the punishment* for criminal acts.'" *People v. Frazer*, 21 Cal.4th at 756 (emphasis original) (quoting *Collins*, 497 U.S. at 43). This Court made clear in *Collins* and subsequent cases, the state supreme court stated, that "the two categories of impermissible retroactive legislation—redefining criminal conduct and increasing punishment—are exclusive." *Id.*

The state supreme court further found that this Court, in *Collins*, had clarified language in *Beazell* prohibiting retroactive elimination of defenses to criminal charges. In

[7] Frazer also argued that applying the new statutory provision to him violated due process principles. The majority held there was no *ex post facto* or due process violation; the dissent found a due process violation based on the state constitution, and so did not reach the *ex post facto* claim.

particular, the California Supreme Court read *Collins* to clarify that *Beazell* "should not be misread as creating a separate or third category of impermissible ex post facto legislation." *Frazer*, 21 Cal.4th at 757. Rather, *Collins* explained that this aspect of the *ex post facto* prohibition applies to retroactive changes that alter "the legal definition of the offenses" or "the nature or amount of the punishment imposed for its commission." *Id.* Accordingly, "the only 'defense[s]' that cannot be restricted or withdrawn for ex post facto purposes are those bearing on the 'definition' or 'elements' of the charged crime, or involving 'an excuse or justification for the conduct underlying such a charge.'" *Id.* (quoting *Collins*, 497 U.S. at 50).

Thus, the court held that "section 803(g) regulates the time at which child sexual abuse *defined and punished elsewhere in the Penal Code* may be charged, but it does not impermissibly withdraw a 'defense' as that term of art is used for ex post facto purposes in [*Collins*]." *Frazer*, 21 Cal.4th at 760. In other words, "[s]tatutes regulating the time at which a future criminal prosecution may be filed do not implicate the manner in which criminal conduct is defined and punished at the time it occurs–the sole concern of the ex post facto clause." *Id.* at 763. Hence, a retroactive change even in the statute of limitations applicable to a criminal offense does not violate *ex post facto* principles.

D. The 1993 Amendment Did Not Alter The Substantive Criminal Law Of Texas

Petitioner makes no claim that the 1993 amendment either (1) created a new criminal offense or (2) increased the punishment for existing offenses, (3) nor has he been deprived of any affirmative defense that was recognized at the time he committed sexual offenses against his stepdaughter. Because there has been no change in the substantive criminal law of Texas, petitioner's *ex post facto* claim must fail.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Texas's brief, the Court should affirm the judgment of the Texas Court of Appeals upholding petitioner's convictions.

Respectfully submitted,

CARLA J. STOVALL
Kansas Attorney General
STEPHEN R. MCALLISTER
Kansas State Solicitor
(Counsel of Record)
301 S.W. 10th Avenue
Topeka, Kansas 66612
(785) 296-2215

Counsel for the Amici States

JANET NAPOLITANO
Attorney General
State of Arizona

RICHARD P. IEYOUB
Attorney General
State of Louisiana

M. JANE BRADY
Attorney General
State of Delaware

JENNIFER M. GRANHOLM
Attorney General
State of Michigan

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

JOE MAZUREK
Attorney General
State of Montana

JEFFREY A. MODISETT
Attorney General
State of Indiana

DON STERNBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

BETTY D. MONTGOMERY
Attorney General
State of Ohio

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

CHARLES M. CONDON
Attorney General
State of South Carolina

JAN GRAHAM
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

October 1999